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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By JOHN L. GRIFFITHS,
OFFICIAL REPORTER.

VOL. 132,
CONTAINING CASES DECIDED AT THE NOVEMBER TERM,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. BYRON K. ELLIOTT.*†
HON. ROBERT W. McBRIDE.**§
HON. JOHN D. MILLER.||
HON. WALTER OLDS.†
HON. SILAS D. COFFEY.†

* Chief Justice at the November Term, 1891.

† Term of office commenced January 7th, 1889.

** Chief Justice at the May Term, 1892.

‡ Term of office commenced January 3d, 1887.

§ Appointed December 17th, 1890, to succeed Hon. Joseph A. S. Mitchell.

|| Appointed February 25th, 1891, to succeed Hon. John G. Berkshire.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
ANDREW M. SWEENEY.

SHERIFF,
JAMES L. YATER.

LIBRARIAN,
WILLIAM W. THORNTON.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1891, IN THE SEVENTY-
SIXTH YEAR OF THE STATE.

182 1
163 40

No. 15,812.

CAMPBELL ET AL. v. FOGG ET AL.

HIGHWAY.—*Location of.*—*Report of Viewers.*—*Public Utility.*—In the matter of the location and opening of a highway the statute does not require the viewers to state in their report that the road will be of public utility. Their report recommending the opening of the road is a sufficient expression of their judgment that it will be of public utility. *McKee v. Gould*, 108 Ind. 107, *Jones v. Duffy*, 118 Ind. 440, *Bowman v. Job*, 123 Ind. 44, distinguished.

SAME.—*Description of.*—*Report of Viewers Must Contain.*—The viewers must give a description of the location of the proposed highway by metes and bounds. For sufficiency of description see opinion.

SAME.—*Selection of "Best Ground."*—*Report Need not State.*—While the statute makes it the duty of the viewers to "locate and mark" the highway "on the best ground," they are not required to state in their report that they have selected the best ground for the route of the proposed highway.

From the Carroll Circuit Court.

M. Winfield, J. C. Nelson, L. D. Boyd and Q. A. Myers, for appellants.

R. C. Pollard and C. R. Pollard, for appellees.

Campbell *et al.* v. Fogg *et al.*

ELLIOTT, C. J.—The appellants petitioned for the location and opening of a highway. The appellees, as the record shows, moved to dismiss the report of the viewers. This motion was overruled, and such proceedings were had as resulted in an order establishing the highway as prayed. The appellees appealed to the circuit court, and there renewed their motion. The circuit court entered judgment remanding the case to the board of commissioners, with instructions to cause the viewers to correct their report by showing whether the highway would be of public utility, and by requiring them to mark and lay out the same.

It is contended by the appellants' counsel that the statute does not require the viewers to state in their report that the road will be of public utility, and by the appellees' counsel that such a statement is required. The statute does not require that the report of the viewers shall contain such a statement. Section 5016, R. S. 1881. It is made their duty to ascertain whether the road will be of public utility, but they are not directed to incorporate their conclusion in their report in express terms. Section 5017, R. S. 1881. The report recommending the opening of the road is a sufficient expression of their judgment that it will be of public utility. This is the doctrine of the case of *Heagy v. Black*, 90 Ind. 534. The case of *McKee v. Gould*, 108 Ind. 107, cited by appellees, is not in point upon this question, for in that case the report was adverse to the petitioners, and the question we have here was not before the court. This is true of the cases of *Jones v. Duffy*, 119 Ind. 440, and *Bowman v. Jobs*, 123 Ind. 44.

It is true, as asserted by appellee's counsel, that the viewers must give "a description of the location by metes and bounds," and this description must be embodied in their report. The course, distance and line of a highway must be brought into the record as the law requires, since that is an essential part of the proceedings. See authorities cited in *Elliott Roads and Streets*, p. 255, note 3. The viewers,

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in their report, say that "We proceeded to view, mark and locate said proposed public highway, commencing on a public highway at the southeast corner of section numbered nine in township twenty-five north, of range one east, in Carroll county, Indiana; thence north on the section line dividing said section nine from section ten in said township and range for a distance of about three-fourths of a mile, where said highway will intersect another public highway, where the highway petitioned for will terminate." This description is clearly sufficient. It might not be sufficient in a jurisdiction where the width of highways is not fixed by law, but it is sufficient in jurisdictions like ours, where a designated width is prescribed by law.

The statute makes it the duty of the viewers to "locate and mark" the highway "on the best ground," but in prescribing what they shall state in their report, the statute does not provide for any statement that the road was located on the best ground, so that the omission of such a statement from the report can not vitiate it nor destroy its effectiveness. The report of the viewers recommending the location of the road, and declaring, as it does, that they have "proceeded to view, mark and locate the proposed highway," implied that they had performed their sworn duty according to law, and hence it is presumptively true, at least, that they selected the best ground for the road and there located it. This conclusion is strengthened by the fact that the statute gives a right to remonstrate, and authorizes the remonstrants to "set forth their grievances," thus giving them an opportunity to tender an issue upon all questions open to investigation, secure reviewers, and if the report of the reviewers is not satisfactory, obtain a trial in due form of law. Sections 5019, 5023, inclusive, R. S. 1881. It is doubtful whether the question as to the best location is, in any event, open to trial except where there is a manifest abuse of authority, inasmuch as the principle declared in analogous cases seems to require the conclusion that the line of the

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highway is to be determined by the proper officers in the exercise of a sound discretion. *Weaver v. Templin*, 113 Ind. 298, and cases cited; *Markley v. Rudy*, 115 Ind. 533; *Kirkpatrick v. Taylor*, 118 Ind. 329; *Amoss v. Lassell*, 122 Ind. 36, and cases cited; *Zigler v. Menges*, 121 Ind. 99 (107), and authorities cited. See authorities cited in *Elliott Roads and Streets*, p. 276, note 2; p. 375, note 1. The authorities are quite well agreed that where the matter is one of discretion, as the route or line of a proposed highway usually is, no notice need precede a decision of such a question, as it is not one open to review except as the statute expressly provides. These rules, taken in connection with the fact that the statute does not require the viewers to state in their report that they have selected the best ground for the route of the proposed highway, make it clear that the omission of such a statement from the report does not render the report obnoxious to such a motion as that interposed by the appellees.

The court erred in sustaining the motion of the appellees, and the judgment must be and is reversed.

Filed May 20, 1892.

No. 15,829.

KERN ET AL. v. ISGRIGG.

INJUNCTION.—*Establishment of Highway.—Disobedience of Mandate.—Contempt of Court.*—Where the board of county commissioners appointed viewers and laid out and established a highway on a section line in a certain township, and the supervisors of certain road districts in said township were mandated to open up said highway on said section line, but disregarding said mandate, they proceeded to open up said highway on a different line, and for that purpose were endeavoring to wrongfully take possession of a portion of the appellee's real estate, and to permanently deprive him of the same, the latter may enjoin them from so doing. The fact that the defendants were liable to punishment for con-

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tempt in disobeying the mandate of the court would not prevent the appellee from proceeding against them by way of injunction.

From the Clinton Circuit Court.

W. R. Moore and *J. Claybaugh*, for appellants.

W. A. Staley and *J. V. Kent*, for appellee.

OLDS, J.—This action was brought by the appellee, David E. Isgrigg, and one Luther Moon, on complaint for perpetual injunction against appellants, William Kern and Noah McKinsey, as supervisors of certain road districts in Jackson township, Clinton county, Ind.

The board of commissioners of said county appointed viewers and laid out and established a certain highway on a section line in said Jackson township; that David E. Isgrigg and others brought proceedings in mandate against the appellants to compel them to open up said highway as established by said board, and in said mandate proceedings said appellants were ordered to open up said highway on said section line as established by said board of commissioners.

The complaint in this action alleges the facts aforesaid—the establishing of the highway, and the order for the appellants to open the same in said proceedings in mandate; that said appellants were duly notified to open the same and a certified copy of the order and decree in the proceedings in mandate delivered to them, and that said appellants, as such supervisors, are opening up said highway not upon the section line as established by the board and ordered and directed by the decree of the Clinton Circuit Court in said mandate proceedings, but are opening said proposed highway on a different line, and on a route entirely different, and are working, laying out, removing the fences, are threatening to place the bridges and culverts and complete said road some thirty feet east of the said section line, running through and unlawfully appropriating for and to the public use for said highway the entire width of said road a strip of ground some thirty feet wide off the west side of the lands of the

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plaintiffs, and compelling the plaintiffs to furnish all of the ground for said road, when the same, as ordered to be opened, is a part to be on the lands of the adjacent land-owners, to the great and irreparable damage of the plaintiffs. Prayer for a temporary and perpetual injunction. There was a trial, resulting in a finding against defendant Moon and in favor of the appellee, Isgrigg.

The appellants demurred to the complaint, also to the evidence, which demurrers were overruled, and such rulings are assigned as error.

It is urged by the counsel for the appellants that injunction will not lie for the reason that the facts pleaded show that appellants were violating the decree and order of the court in the mandate proceedings, and that the appellee had an adequate remedy at law, in that he might, upon proper application, have had appellants punished for contempt of court in violating the order and decree of court in the mandate proceedings. We are not cited to any authority in support of this position, except the sections of the statute authorizing the punishment of parties for contempt in disobeying an order of injunction. We do not think this precludes the party from instituting injunction proceedings and having the persons enjoined from wrongfully entering upon and opening up a highway across his land.

In *Kyle v. Board, etc.*, 94 Ind. 115, it is held that in a proper case wrongful entry on land to make a public way or bridge may be prevented by injunction. In that case it is said: "It is true that an injunction will not be granted to restrain the commission of a simple trespass, but it is also true that an injunction will lie where the entry on land is under a claim of right which might, by lapse of time, grow into a title. In this case, if the appellant had tacitly assented to the building of the bridge on the line of the abandoned highway, and a considerable period of time had elapsed without objection on his part, a dedication might have been presumed against him, and to prevent such a result he had a right to

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an injunction against the unauthorized use of his land for the purpose of a highway. A land-owner has a right to invoke the strong arm of the courts to prevent a permanent wrongful occupancy or appropriation of his land."

In *Clark v. Jeffersonville, etc., R. R. Co.*, 44 Ind. 248, it is held that an injunction will lie if the remedy at law is not as practical and efficient to the needs of justice and its prompt administration as the remedy in equity.

In *Central Union Tel. Co. v. State, ex rel.*, 110 Ind. 203, it is held that the disturbance of the possession of real estate may be prohibited by injunction. As appears by the averments in the complaint in this case, the appellants were not carrying out the order of the board of commissioners, or the order of the court in the mandate proceedings, but were endeavoring to wrongfully take possession of the appellee's real estate and turn it into a public highway; not merely to commit a trespass, but to permanently deprive the appellee of the land; and he had a right to have his possession and ownership protected by injunction.

The complaint was sufficient, and the court did not err in overruling a demurrer to it.

We have also examined the evidence. There is some evidence to support the finding.

There is no error in the record.

Judgment affirmed, with costs.

Filed May 20, 1892.

The Town of North Manchester v. Oustal.

No. 15,839.

THE TOWN OF NORTH MANCHESTER v. OUSTAL.

MUNICIPAL CORPORATION.—*Validity of Penal Ordinance.*—*Justice of the Peace.*—*Appeal to Supreme Court.*—Where a party was prosecuted before a justice of the peace for the violation of a penal ordinance of a town, the amount demanded being twenty dollars, and the only question involved being the guilt or innocence of the accused, there is no right of appeal, on the part of the town, to the Supreme Court, under section 632, R. S. 1881. The failure to convict the accused left the ordinance unaffected by the litigation, so that the validity of the ordinance upon which the prosecution was based was not in question.

From the Huntington Circuit Court.

J. B. Kenner and B. F. Clemens, for appellant.

M. H. Kidd, N. G. Hunter and E. E. Eikenborg, for appellee.

MILLER, J.—The appellee was prosecuted before a justice of the peace for the violation of a penal ordinance of the appellant.

The amount demanded in the complaint was the sum of twenty dollars.

We are met at the threshold with the question of jurisdiction.

Section 632, R. S. 1881, gives a right of appeal from all final judgments of circuit and superior courts, "except in actions originating before a justice of the peace or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars: *Provided*, however, That this exception shall not apply to prohibit an appeal in cases originating before a justice of the peace or mayor of a city, involving the validity of an ordinance passed by an incorporated town or city."

The fact that payment of judgments rendered in actions for the violation of penal ordinances may be enforced by imprisonment will not give a right of appeal. *Quigley v. City of Aurora*, 50 Ind. 28.

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Counsel for appellant strenuously insist that the validity of the ordinance, upon which the prosecution was based, was brought in question, and that, therefore, the right of appeal is not taken away by the exception contained in the above recited section.

If this position of counsel is correct, the jurisdiction on appeal is in this court; for the only right of appeal given in actions originating before justices of the peace where the amount involved is less than fifty dollars, is in cases involving the validity of an ordinance passed by an incorporated town; and in such cases the appeal must be to this court. Elliott's Appellate Procedure, sections 43, 56.

We are unable to agree with counsel in their contention, that the validity of an ordinance is involved. An examination of the record convinces us that the only question involved was the guilt or innocence of the accused of a violation of the provisions of the ordinance. The failure to convict the appellee left the ordinance unaffected by the litigation.

The appeal is therefore dismissed at appellant's costs.

Filed May 19, 1892.

No. 15,654.

MCWHINNEY v. THE CITY OF LOGANSPORT.

TAXES.—Recovery of Amount Paid.—School Mortgage.—Priority of Lien.—

Land on which the owner has placed a mortgage in favor of the State, securing the payment of school funds, is as much liable to taxation as any other land, and one buying it at a tax sale within the year for redemption from a sale on foreclosure of the mortgage can not recover the amount paid for taxes. The school mortgage was at most but a prior lien to the city taxes. The purchaser at tax sale was bound to take notice of the school mortgage and the decree of foreclosure, both being a matter of public record. He must be held to have purchased with full knowledge of the existence of the school mortgage, the foreclosure and sale, and to have purchased subject to said lien. Section 6487, R. S. 1881, and Acts of 1883, p. 95. Section 1, specifying in what cases taxes paid can be recovered, does not apply to the cases at bar

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159 145

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SAME.—Description of Land.—What is Sufficient.—If the description of the land on which taxes have been paid is such as that it can be identified as the property owned by the person, and liable to taxation at the time of the assessment, it is sufficient.

SAME.—Voluntary Payment of.—Mistake of Law.—Where taxes are voluntarily paid, with full knowledge of the facts, they can not be recovered. A mistake as to the law will avail nothing in such a case.

From the Cass Circuit Court.

J. T. Lecklider, S. T. McConnell and A. G. Jenkins, for appellant.

T. J. Tuley, for appellee.

OLDS, J.—On the 12th day of October, 1873, one Newton H. Cain and Eveline Cain, his wife, executed to the State of Indiana a school fund mortgage on certain real estate situate in the city of Logansport, Cass county, Indiana, securing the payment of \$650, with interest at eight per cent. The school fund mortgage was duly foreclosed in the Cass Circuit Court, and the real estate duly sold on the decree of foreclosure and bid off by the auditor of said county in the name of the State, on the 21st day of January, 1882, for the sum of \$1,150, the full amount due; and afterwards, on the 28th day of February, 1883, a deed was issued by the sheriff of said county to the auditor of said county.

On the 23d day of August, 1883, the auditor of said county resold said land for \$1,000.

On the 7th day of March, 1882, the city of Logansport sold said lands to one Solomon Jones for taxes for \$219.23, and he received a tax certificate as evidence of his purchase, which amount he paid into the city treasury. Said tax sale was for the taxes duly and legally assessed against said property for the years 1874–1881, inclusive, and which were delinquent. Subsequent to the purchase at tax sale said Jones, for a valuable consideration, sold and assigned his tax certificate to the appellant herein, who, on the 1st day of February, 1884, paid to the city \$19.62 taxes claimed to be due on said real estate. The appellant brings this suit

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against the city to recover back the amount paid at the tax sale and the subsequent taxes paid. Issues were joined and there was a trial, resulting in a finding and judgment for the appellee. The only error discussed is the overruling of appellant's motion for a new trial.

It is contended by counsel for appellant that the land was not liable for taxation by the city for the reasons stated in section 6487, R. S. 1881, also Acts of 1883, p. 95, section 1; that these sections mean that if the title or lien fails in the purchaser the money paid by the purchaser shall be refunded.

We can not agree with the theory of counsel. The real estate was clearly liable for the taxes assessed against it for the years for which taxes were assessed and upon which the sale was made by the city. At the time the city sold the land for taxes the year for redemption from the sale on the decree of foreclosure on the school mortgage had not expired, and it was at most but a prior lien to the city taxes. The purchaser at tax sale was bound to take notice of the school mortgage and the decree of foreclosure, both being a matter of public record, so that the purchaser must be held to have purchased with full knowledge of the existence of the school mortgage, the foreclosure and sale, and he purchased subject to such lien. *State, ex rel., v. Jones*, 95 Ind. 175; *City of Logansport v. McConnell*, 121 Ind. 416.

The sections of the statute referred to by counsel have been construed by this court in the *City of Logansport v. Case*, 124 Ind. 254.

There are but four cases where the tax paid can be recovered back: *First*. When the land sold was not liable to taxation. *Second*. When the taxes have been paid. *Third*. When the description of the land is so imperfect as to fail to identify the land, and, *Fourth*. When the sale is made without authority of law; that is, a sale without the scope and purview of the law, and not an erroneous sale, in the language of the statute itself a sale "without authority of law."

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Land on which the owner has placed a mortgage in favor of the State, securing the payment of school funds, is as much liable to taxation as any other land. It would be a strange doctrine to hold that the owner of land could avoid taxation of such land by placing a school mortgage upon it. The land was liable to taxation, and it is not contended that the taxes had been paid at the time of the sale, nor was the description so defective as to fail to describe the land with reasonable certainty. There was an answer filed setting out a proper description, and alleging facts showing the description sufficient to identify the land assessed to be the land of Cain. If the description is such as that it can be identified as the property owned by the person, and liable to taxation at the time of the assessment, it is sufficient. There is not the same strictness required in descriptions of real estate for taxation and in tax sales as is required for other purposes. The descriptions are necessarily abbreviated. *Cooper v. Jackson*, 99 Ind. 566. As to the amount of tax subsequently paid, it was paid with full knowledge of the facts, and was a voluntary payment, but it does not appear for what year the amount was assessed. The city was claiming the tax, and the appellant voluntarily paid it. He had full knowledge of the facts, and if he was mistaken as to the law it will avail him nothing. It is a voluntary payment and can not be recovered. One can not voluntarily pay a tax under such circumstances, and then sue and recover it back. For aught that appears in the brief of counsel, or pointed out in the record, the tax was legally assessed against the land and for which the land was liable. *Worley v. Moore*, 77 Ind. 567; *Butt v. Jennings School Tp.*, 81 Ind. 69; *Hines v. Board, etc.*, 93 Ind. 266; *Board, etc., v. Armstrong*, 91 Ind. 528, and authorities there cited.

There is no error in the record.

Judgment affirmed, with costs.

Filed May 18, 1892; petition for a rehearing overruled June 11, 1892.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1892, IN THE SEVENTY-
SEVENTH YEAR OF THE STATE.

No. 15,513.

THE FORT WAYNE, CINCINNATI AND LOUISVILLE RAIL-
ROAD COMPANY v. GRUFF.

132	13
139	415

RAILROAD.—*Action for Personal Injuries.—Complaint.—Averments as to Contributory Negligence.*—In an action against a railroad company to recover damages for personal injuries, it must affirmatively appear from the averments of the complaint that the injured party himself was without fault. This may be by the simple general averment that he was without fault, or there may be such a statement of facts without any such general averment as will be sufficient.

SAME.—*Foreign Car.—Duty of Employee to Inspect.*—If the employee of a railroad company is injured by reason of defects in a car transferred to said company by another railroad, and by the rules of the company known to said employee, it is his duty to inspect said car; he can not recover for injuries caused simply by his failure to make the inspection.

From the Allen Circuit Court.

R. C. Bell and S. R. Morris, for appellant.

— **Holland,** — **Lamb, L. M. Ninde and A. A. Pur-**
man, for appellee.

The Fort Wayne, Cincinnati and Louisville Railroad Co. v. Gruff.

MCBRIDE, C. J.—The first question presented for our consideration in this case is the sufficiency of the complaint. The appellee, while in the service of the appellant, as conductor of a freight train, received injuries for which he seeks in this action to recover damages. The appellant contends that the complaint is defective for the reason that it does not show actionable negligence on the part of the appellant, and because it does not show that the appellee was himself free from contributory negligence.

So far as the averments of negligence on the part of the appellant is concerned, we think the complaint is sufficient to withstand demurrer.

We are of the opinion, however, that it is fatally defective upon the other ground. It does not contain the usual, general averment that the appellee was himself without fault. The pleader has attempted to supply the want of this averment by specific averments showing the degree of care actually exercised by the appellee.

Citation of authority is hardly necessary that in actions of this character, in this State, the complaint must show a case of unmixed negligence upon the part of the defendant. It must affirmatively appear from its averments that the injured party was himself without fault. This may be shown by the simple general averment that he was without fault, or there may be such statement of facts, without any such general averment, as will be sufficient. It is, however, essential that it be clearly shown that the injured party was free from contributory negligence. *Louisville, etc., R. W. Co. v. Lockridge*, 93 Ind. 191; *Riest v. City of Goshen*, 42 Ind. 339; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322, and a large number of other cases.

Long usage and authority have sanctioned the use of the general averment that the party was without fault as sufficient, unless specific averments in the pleading show affirmatively that he was, nevertheless, without fault. Not only

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has it been held sufficient, but that, as a rule, it is the best formula for the expression of that fact.

In *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196 (1898), the court uses this language: "It is evident that any other rule would be practically incapable of enforcement, for a negative fact can seldom be alleged except generally and by way of denial, since any other course would require a process of exclusion and elimination that would lead to an almost endless pleading. If the specific facts absolving the plaintiff from fault must be pleaded, then it would be necessary to enumerate every fact that might be considered as tending to charge him with fault, and negative its existence. In some cases this process of enumeration and exclusion would be practically impossible; in others it would lead to a prolixity of pleading that would do no good, but would produce uncertainty and confusion."

The language above quoted finds a forcible illustration in the case at bar; not that the complaint is prolix, but that the pleader, possibly in the effort to avoid prolixity, has failed to specify and negative several particulars in which the plaintiff may have been at fault, notwithstanding all that is averred.

We deem it unnecessary to quote the complaint, as its defects are patent.

Several other questions are presented by the record and discussed. The principal and most important relate to the weight and interpretation to be given to the evidence in certain particulars, bearing upon the duties, relative and absolute, resting upon both the appellant and the appellee.

The complaint charges that the appellee's injuries were caused by certain defects in a car, transferred from another railroad to the appellant, and which he was, when injured, in the act of placing in his own train. He insists that under the circumstances the appellant was negligent in not having the car inspected before requiring him to place it in his train, and that such inspection would have disclosed its defective

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character. The appellant insists that under the circumstances no duty of inspection rested upon it; but, if such inspection was necessary, the rules of the company cast that duty upon the appellee, and that the failure to make the inspection, if negligent, was his own negligence.

The defective character of the complaint requires a reversal of the judgment and a reformation of the issues, from the complaint up. It is of course impossible for us to anticipate what changes in the issues, and, in consequence, what changes in the evidence, may be the result. Except in a general way, these questions may not arise upon a new trial, and we do not therefore deem it necessary to say more than that, so far as concerns the duty of a railroad company to inspect foreign cars tendered it by another company for transportation over its own lines, that question has been several times considered by this court, the latest case being that of *Chicago, etc., R. W. Co. v. Fry*, 131 Ind. 319. We as yet see no reason to change the opinions there expressed.

If, by the rules of the company, known to the appellee, the duty of making such inspection was in fact cast upon him, it is manifest that he can not recover for injuries caused simply by a failure to make the inspection. The negligence in such case would be his own.

Judgment reversed, with instructions to the Allen Circuit Court to grant a new trial, and sustain the demurrer to the second paragraph of complaint.

Filed May 23, 1892.

 Artman, Surveyor, v. Wynkoop et al.

No. 15,786.

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145	130

ARTMAN, SURVEYOR, v. WYNKOOP ET AL.

DRAINAGE—*Drain Partially Constructed.—Duty of County Surveyor to Keep in Repair.*—When a drain was constructed as far as it was constructed under the act of March 9, 1875, it was the duty of the county surveyor (Section 1193, Elliott Supp.) to have the portion constructed kept in repair, and jurisdiction was conferred upon him to do so. The propriety of making such repairs having been committed to his discretion, his decision was final.

From the Jay Circuit Court.

O. P. Mahon, for appellant.

S. M. Ralston and *M. Keefe*, for appellees.

MILLER, J.—This was an appeal from an assessment made by a county surveyor for the repair of a public drain, to the circuit court.

At the request of the parties the court found the facts specially, and stated its conclusions of law upon them.

The assignment of error is, that the court erred in its conclusions of law on the findings.

A synopsis of so much of the finding as we deem necessary to present the question of law discussed is as follows:

That on the 13th day of June, 1881, a petition was filed in the auditor's office of Boone county for the location and construction of a public drain; that such proceedings were had in the commissioners' court as that viewers were appointed and a report made in favor of the utility of the improvement, and an assessment made upon the lands benefited; that on the 6th day of September, 1881, the board approved the report, and ordered the ditch or drain established and constructed, the proposed drain being of the total length of 6,110 feet, divided into 61.10 stations of 100 feet each; that the drain was fully constructed from stake No. 61.10, at the

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mouth of said drain, to stake No. 19, being 4,210 feet of the lower end of said drain; that from stake No. 19 to stake No. 8, being 1,100 feet of the drain, the same never was constructed; that from stake No. 8 to stake No. 0, said drain was tiled and was fully constructed and completed; that the county surveyor, having been notified that the ditch was in need of repairs, caused the same to be repaired, beginning at stake No. 19 and repairing the same to its full dimensions, as originally constructed, to stake No. 61.10, and the cost of making the repairs was paid out of the county treasury. The assessment appealed from was made to reimburse the county treasurer for this expenditure.

As conclusions of law from these facts the court found:

1st. That if the surveyor was authorized to make any assessment against the lands assessed for the construction of the drain, the assessment made by him against the lands of the plaintiffs was properly made, and for the proper amounts, and that the assessment so made should be confirmed by the court.

2d. That said drain having never been constructed, the surveyor had no jurisdiction or authority to repair the same, and, therefore, the assessments against the lands of the plaintiffs for such repairs were unlawful and void, and ought to be set aside.

The question involved is a question of jurisdiction.

The appellee contends that until a drain is fully and finally completed, and the commissioner charged with its construction has made report of its completion, the jurisdiction of the court ordering the work is exclusive, and, therefore, that until that time a county surveyor has no jurisdiction to have it repaired.

The appellant contends that when a specific portion of a drain has been fully completed, it is made the duty of a county surveyor to have it kept in repair, as commanded in section 1193, Elliott Supp.

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The original petition for the construction of this drain was filed June 13th, 1881, in the auditor's office, and the improvement was ordered and the original assessment made by order of the board of commissioners. It thus appears that the drain was not constructed under the circuit court act of April 8th, 1881, section 4273, R. S. 1881, nor under the act of April 21st, 1881, section 4285, R. S. 1881, for that act was not in force until September 19th, 1881. From the language used in the special finding of facts descriptive of the proceedings and order of the board of commissioners, we are convinced that the original drain was constructed, so far as it was constructed, under the act of March 9th, 1875, Acts of 1875, p. 97.

This act differed in many respects from the subsequent enactment. One important difference affecting this case is that under the act of 1875 drains were not constructed under the supervision of any officer or persons appointed by the board of commissioners ordering their establishment.

Assuming, but by no means deciding, that the circuit and commissioners' courts have, as claimed by appellees, exclusive jurisdiction of the construction of public drains constructed under the acts of 1881 and 1883, so as to prevent a county surveyor from having completed portions of an unfinished drain cleaned out and kept in repair, no such conflict exists when the drain has been constructed under the act of 1875.

The drain having been constructed for the purpose of drainage, under a public law, section 1193, Elliott Supp., made it the duty of, and conferred jurisdiction upon the county surveyor to have it kept in repair. The propriety of making the repairs having been committed to his discretion, his decision was final. *Markley v. Rudy*, 115 Ind. 533; *Kirkpatrick v. Taylor*, 118 Ind. 329; *Zigler v. Menges*, 121 Ind. 99; *Amoss v. Lassell*, 122 Ind. 36; *Bunnell v. Peet*, 124 Ind. 436; *Taylor v. Brown*, 127 Ind. 293.

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The judgment is reversed, with instructions to the court to restate its conclusions of law, and render judgment in accordance with the opinion.

Filed May 24, 1892.

No. 15,897.

THOMPSON ET AL. v. GOLDTHWAIT ET AL.

GRAVEL ROADS.—*Construction of.—What Does Not Disqualify Engineer.*—

The fact that the person appointed as engineer and surveyor for the location and construction of a free gravel road was the owner of real estate within the limits assessable for the construction of said road, and which was reported as benefited, and was a brother-in-law of one who also owned lands within the limits assessable for the road, and which was reported as benefited, did not disqualify him from serving in that capacity. The statutes of this State do not provide that the engineer shall be either disinterested or a freeholder, or even a resident of the county, but simply that he shall be a competent engineer. The engineer is not a member of the board of viewers, and has nothing to do with the assessments to be made.

From the Grant Circuit Court.

J. T. Strange, E. A. Huffman, A. Baker and E. Daniels,
for appellants.

W. H. Charles, for appellees.

OLDS, J.—This action was commenced by the appellees and others filing their petitions with the board of commissioners of Grant county, Indiana, asking for the location and construction of a free gravel road. The petition was presented to the board on the 12th day of June, 1889. On said day fourteen of the petitioners withdrew their names from the petition; afterwards some others withdrew their names. On said day the appellants appeared before said board, and presented their objections in writing to the appointment of Simon P. Burley as engineer and surveyor on

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said road on account of his interest and relationship within the degree prohibited by law, and thereupon said board appointed two viewers, and over the objection of the appellants appointed said Simon P. Burley as engineer and surveyor on said road.

At the September term, 1889, of said board of commissioners the said viewers and engineer made to said board their report, and thereupon the appellants moved in writing to reject and dismiss said report for the reason that the engineer, Burley, was the owner of real estate within the limits assessable for the construction of said road, and which is reported as benefited and ought to be assessed, and for the further reason that he was a brother-in-law of John Hurtsoch, who also owns lands within the limits assessable for the road, and which is reported as benefited and described in the report; that these disqualifications existed at the time said Burley was appointed. The board overruled said motion, approved the report, ordered the construction of the improvement, and appointed said Simon P. Burley superintendent, and appointed a committee to apportion the cost of construction, and thereupon the appellants appealed said cause to the circuit court.

In the circuit court there was a trial by the court without the intervention of a jury, and on proper request the court made a special finding of facts and stated its conclusions of law. The court found that the said Burley owned land which will be affected by the making of the gravel road, that he was a brother-in-law of John Hurtsoch who also owned land which will be benefited by the construction of the road, and that appellants objected to the appointment of Burley, and that they made a motion to reject and dismiss the report when the same was filed, as hereinbefore stated, and that said Burley also signed the petition for the road, and stated conclusions of law in favor of the appellees. Appellants excepted to the conclusions of law, and prosecute this appeal.

The question presented involves the construction of the

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statute providing for the appointment of viewers and an engineer or surveyor by the board of commissioners on the filing of a petition for the construction of a gravel road.

It is contended on the part of the appellants that the engineer becomes one of the board of viewers, and that his duties are judicial, and, therefore, Burley was incompetent to act on account of his interest and relationship to one of the land-owners whose land was affected by the construction of the road, and objection having been made to his appointment at the proper time, it was error to appoint him over such objection, and that the report should have been rejected and dismissed on the motion of the appellants.

The appellees admit that if the engineer becomes one of the board of viewers, his duties are judicial, and the court erred, and the judgment must be reversed, but they contend that he is not a member of the board of viewers, and his duties are not judicial, and that such engineer is not required to be disinterested; that he has nothing to do in determining the property benefited, and that the statute does not contemplate that such engineer should be a disinterested person, but only a competent engineer.

The statute (section 5092, R. S. 1881) provides that upon presentation of the petition and the filing of a bond, the board of commissioners shall appoint three disinterested freeholders of the county as viewers, and a competent surveyor or engineer, to proceed upon a day to be named by the commissioners to examine, view, lay out, or straighten said road as in their opinion public convenience and utility require.

Section 5093 provides that said viewers and engineer shall meet at the time and place specified, and take an oath to discharge the duties of their appointment respectively, and that they shall select two chain carriers and one marker, and proceed to do the things required of them by the statute, including the assessment of damages. This section then provides that the viewers shall not be required to assess damage to any person or persons except minors, etc., unless the owner

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or owners thereof, or their agents, shall have filed a written application with said viewers, giving a description of the premises on which damages are claimed by them, within ten days after the completion of the survey of said road by said viewers.

The first part of section 5094 requires the viewers and engineer to make report to the commissioners at their next regular session, stating what the report shall show. In the latter clause of the section it is provided that where lands are liable to be assessed under the act for the construction of two or more roads, the viewers shall take into consideration that fact in assessing benefits.

While these sections do not point out with clearness the respective duties of the viewers and the engineer, yet when they are all read and construed together, the intent of the Legislature is reasonably certain. In every instance where they speak of an assessment separate from the other duties, they speak of the viewers alone. The oath indicates that they have separate duties, for it requires them to take an oath that they will discharge the duties of their appointment respectively.

In section 5093, it is provided that such viewers shall not be required to assess damages to any person except in certain cases. The written application for damages is required to be filed with the viewers within ten days after the completion of the survey by the viewers.

In the latter part of section 5094, it is provided that the viewers, in assessing benefits, shall take into consideration the fact that the land is liable to be assessed for other roads. It is provided that the viewers appointed shall be disinterested freeholders of the county, and that a competent surveyor or engineer shall be appointed.

It is clear, as it seems to us, that the assessment shall be made by the viewers alone.

It is not provided that the engineer shall be either disinterested or a freeholder, or even a resident of the county, but he shall be a competent surveyor or engineer. It is

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manifest that the purpose of the appointment of an engineer is to have a skilled person to aid the viewers in laying out the road and estimating the costs of construction, to aid the viewers in the discharge of their duties, and he is required to take an oath that he will faithfully discharge his duties, and the fact that he is to join in the report does not make him an appraiser of the benefits or an assessor of the damages. The viewers who are to assess benefits and damages must be disinterested freeholders of the county, men who would have a knowledge of the value of land and the effect upon it by the construction of the road, but, in the selection of a surveyor or engineer, he is chosen by reason of his competency and knowledge in that line of duty. The appointment of a surveyor is to aid the viewers in the location and estimation of the work to be done and improvement to be made. The fact that the board is to appoint a competent surveyor or engineer carries with it an implication that his duties are that of a surveyor or engineer.

The assessments of benefits or damages to the lands of Burley, and the lands of his brother-in-law, were to be made by the viewers. The duties of Burley were that of a surveyor and engineer in aid of the viewers in the discharge of their duties, and not that of a viewer or appraiser of benefits or damages. It being the duty of the engineer to aid in the location of the work and making estimates of the costs, he is required to join with the viewers in their report. In this case the report does not show that Burley took any part in viewing the land and assessing benefits and damages, but on the contrary he makes a separate statement showing that he, in connection with viewers, did lay out the road, giving his estimate of the costs of grading, making cuts and fills, culverts, bridges, and grading the road, which is filed with and is a part of the viewers' report.

There is no error in the record.

Judgment affirmed, with costs.

Filed May 19, 1892.

 Clark v. Clark.

No. 15,756.

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139	25
141	183

WILL.—Election Under.—Husband and Wife.—Where a wife dies testate, making provision in her will for her husband, the husband may elect to take under the will or under the law, but can not take under both; and when he elects to take under the one, he divests himself of his rights under the other.

VERDICT.—Should Have Reasonable Construction.—Technical Defects.—A verdict, however informal, is good if the court can understand it. It is to have a reasonable intendment, and to receive a reasonable construction, and is not to be avoided unless from necessity, and, if rendered upon substantial issues of fact, should not be disregarded on account of mere technical defects.

From the Elkhart Circuit Court.

H. C. Dodge and *J. S. Dodge*, for appellant.

J. H. State and *L. Chamberlain*, for appellee.

COFFEY, J.—This was an action for the partition of real estate. The complaint is in the usual form. The appellee answered, in substance, that Ruth Clark, who was the mother of the appellee, died testate, devising the land in dispute to David J. Clark, her husband, for life, with remainder over in fee to the appellee; that said David elected to take under the will, and departed this life on the 19th day of May, 1889, whereby the appellee became the owner in fee of the whole of the land.

The appellant replied by general denial.

The cause was tried by jury, resulting in a special verdict, upon which the court rendered judgment for the appellee.

The court did not err, in our opinion, in overruling a demurrer to the answer.

It is true that under the provisions of section 2485, R. S. 1881, the husband, at the death of his wife, takes one-third in fee of the land of which she died seized, whether she died testate or intestate; but where the wife leaves a will, making provision for the husband inconsistent with his rights

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under the law, no valid reason can be assigned, in our opinion, why he may not elect to abandon his rights under the law, and take in lieu thereof the provisions made for him by the will.

To deny this right renders it impossible for the wife to make a provision for the husband in lieu of his legal right, however advantageous to him it may be, for it will not be contended that if a provision is made in lieu of his legal rights that he may take both.

Such a contention would be in the face of all the authorities by which wills are construed and enforced.

The case *O'Hara v. Stone*, 48 Ind. 417, is not in point here for the plain reason that the wife in that case made no provision in her will for the husband, and he was not under the necessity of making an election. In this case, however, the will of Mrs. Clark devises the fee of the whole of the land owned by her at the time of his death to the appellee, and carves out a life estate for her husband, David J. Clark.

This is inconsistent with the rights of the husband under the law. He could not take one-third in fee and the remainder for life. *Wright v. Jones*, 105 Ind. 17.

We think, therefore, that if he elected to take the provisions made for him under the will of his wife, he divested himself of his statutory rights, and upon his death there was nothing to descend to the appellant, his grandson.

It is true that the verdict in this case is somewhat vague and uncertain, but the fair inference to be drawn from its language is that David J. Clark elected to take under the will of his deceased wife. This was the vital issue between the parties. A verdict, however informal, is good if the court can understand it. It is to have a reasonable intentment, and to receive a reasonable construction, and is not to be avoided unless from necessity. If rendered upon substantial issues of fact, presented by the pleadings, it should not be disregarded on account of mere technical defects. *Daniels v. McGinnis*, 97 Ind. 549.

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Under this rule the verdict before us was sufficient to authorize a judgment for the appellee.

It may well be doubted as to whether evidence of the mental condition of David J. Clark was admissible under the issues in this cause. At all events the court did not err in the matter of which the appellant complains.

There is no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed May 23, 1892.

No. 15,359.

THE BOARD OF COMMISSIONERS OF HAMILTON COUNTY v.
NEWLIN ET AL.

132 27
151 523

GRAVEL ROAD.—*Construction of.*—*Extra Services Rendered by Contractor.*—*Liability of County Commissioners for.*—Where a board of county commissioners entered into a contract with the appellees to construct a free gravel road, and the work was completed according to the contract, but during its progress the appellees, at the request of the board, performed extra services not embraced in the contract, the extra work being required by reason of changes made by the board and its engineer, an action may be maintained against the board for the value of such extra services. *Board, etc., v. Fahlor*, 114 Ind. 176, distinguished.

SAME.—*Evidence.*—*Acceptance of Work by Engineer.*—It was proper for the appellees to prove that the engineer had accepted the road, since the contract provided for its acceptance by him, and his certificate was competent evidence of acceptance.

CONTRACT.—*Recovery Under Written and Oral Contracts.*—Where work is done in part under a written contract and in part under an oral one, the recovery may be upon the written contract as to the part of the work under it, and for the part done under the verbal contract the recovery may be upon that contract.

VERDICT.—*General.*—*Answers to Interrogatories.*—A party is not entitled to judgment on the answers to special interrogatories unless there is an irreconcilable conflict between the general verdict and the answers. The fact or facts must overthrow the general verdict, or the judgment must

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be given upon it, for the reason that mere conclusions of law are ineffective.

From the Hamilton Circuit Court.

T. J. Kane, T. P. Davis and W. F. Christian, for appellant.

G. Shirts and M. Vestal, for appellees.

ELLIOTT, J.—The appellees allege in the first paragraph of their complaint that they entered into a contract with the appellant to construct a free gravel road; that they performed their part of the contract, and estimates were duly issued to them by the engineer; that the appellant issued and sold bonds to secure funds to pay the cost of constructing the road; that it has the avails of the sale of bonds in its hands. The second paragraph contains substantially the same allegations as those we have outlined, but it also contains additional averments. The substance of the additional averments is this: That the plaintiffs completed the work according to the contract and to the satisfaction of the engineer; that in performing the work, and at the request of the engineer and of the appellant, the plaintiffs performed extra services not embraced in the contract; that the extra work was required by changes made by the appellant and its engineer. The items of the extra work are fully and specifically set forth.

The second paragraph of the complaint is assailed upon the ground that the board of commissioners had no authority to change the contract. We regard it as exceedingly doubtful whether, in any case, the board, having ordered and required a change in a contract, is in a situation to defeat a contractor who has obeyed its orders and requirements. It certainly can not be permitted in such a case as this to repudiate its own acts at the expense of the contractor who has done what it exacted of him and what its engineer required. Whether there could be an entire or radical change of the contract or a complete departure from it is not here the

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question, for the complaint avers that the work contracted for was performed according to the contract, so that the only question is as to the right to compensation for extra work. It has been held that, even where cost of an improvement is to be paid directly by property owners, the municipal authorities have some discretion as to directing changes in the contract or in the mode of doing the work, and, as shown in the cases referred to, this discretion must necessarily exist or the work may become utterly valueless because of some unforeseen cause. *Sims v. Hines*, 121 Ind. 534, and cases cited; *Board, etc., v. Silvers*, 22 Ind. 491; *Ross v. Stackhouse*, 114 Ind. 200 (203). See authorities cited in *Elliott Roads and Streets*, 414. There are, however, statutory provisions bearing directly upon this question, and it has been repeatedly held that under these provisions extra work may be paid for in cases where it becomes necessary and is properly ordered. *Board, etc., v. Fullen*, 111 Ind. 410; *Spidell v. Johnson*, 128 Ind. 235; *Martin v. Neal*, 125 Ind. 547, 555; *Rogers v. Voorhees*, 124 Ind. 469, 471; *Board, etc., v. Fullen*, 118 Ind. 158; *Board, etc., v. Hill*, 115 Ind. 316; *Board, etc., v. Fahlor*, 114 Ind. 176.

It is true, as has been often affirmed by our decisions, that the claim of the contractor does not constitute a general debt of the county. *Strieb v. Cox*, 111 Ind. 299; *Vigo Tp. v. Board, etc.*, 111 Ind. 170; *Spidell v. Johnson, supra*.

But while this is true, it is also true that where the contractor shows that the board made a contract with him, that he performed his part of the contract, and that the board refused payment of the sum due, a *prima facie* case is stated. *Board, etc., v. Hill, supra*. The board is an immediate party to the contract, and as such may be sued for a breach, and all that is incumbent on the plaintiff to do is to state such facts as constitute a cause of action upon the contract. If there is any defence, it must be affirmatively pleaded.

We have no such question concerning notice as was pre-

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sented in *Board, etc., v. Fahlor, supra*, for here the action is upon the contract against one of the contracting parties, while in that case the proceeding was one in which it was sought to enforce an assessment against the land-owner.

The appellant asserts that the trial court erred in denying its motion for judgment upon the answers returned by the jury to interrogatories. It is well settled that a party is not entitled to judgment on the answers to the special interrogatories unless there is an irreconcilable conflict between the general verdict and the answers. It is also settled that, as the general verdict covers the entire issue, or issues, in the case, judgment must go upon the general verdict unless the answers contain some fact, or facts, overthrowing the general verdict upon all the material issues. *Pea v. Pea*, 35 Ind. 387; *Kealing v. Voss*, 61 Ind. 466. If, therefore, there is no irreconcilable conflict between the special answers and the general verdict, the motion of the appellant was not well taken, nor was it well taken unless the facts stated overthrow the general verdict upon all the material issues. We say the fact, or facts, must overthrow the general verdict or the judgment must be given upon it, for the reason that mere conclusions of law are ineffective. Special facts, and not conclusions, are of controlling effect. See authorities cited in *Elliott's Appellate Procedure*, section 651, note 4; section 752, note 4.

Assuming for the present (what we think can not be validly assumed) that both the paragraphs count on the written contract entirely, still the general verdict must stand. The answer that the appellees did "not perform the work substantially according to the contract," is a conclusion involving matters of law, and can not be assigned a controlling effect. The specific answer that the appellees did not construct the road of smooth grade and of the width of twelve feet does not necessarily override the general verdict, inasmuch as it may be true that the work was better done than the contract required, and hence the general verdict is right, because the

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appellant suffered no injury. But if we are wrong in this statement, still, the general verdict can not be regarded as overthrown, for if the engineer received the work and estimated it, his estimate would stand unless fraud or mistake is shown. *McCoy v. Able*, 131 Ind. 417; *Linville v. State, ex rel.*, 130 Ind. 210.

We are satisfied that the whole theory of the appellant as to its right to judgment upon the answers to interrogatories is wrong, for it proceeds upon the assumption that both paragraphs are based upon the written contract. This theory opposes the settled doctrine that where work is done in part under a written contract and in part under an oral one, the recovery may be upon the written contract as to the part of the work done under it, and for the part done under the verbal contract the recovery may be upon that contract. *Wolcott v. Yeager*, 11 Ind. 84; *Everroad v. Schwartzkopf*, 123 Ind. 35 (38), and cases cited. It is unnecessary to inquire or decide how far the rule asserted in the case last cited can apply to such a case as this, for it is sufficient to affirm that, whatever may be its limitations, it extends far enough to authorize a recovery upon the contract set forth in the second paragraph of the complaint. The contract pleaded shows a legal liability for the reasonable value of the work done under it, and states a *prima facie* cause of action. As there is a verbal contract clearly authorizing a recovery for the reasonable value of the extra work ordered and accepted by the appellant, there was no right to judgment upon the answers against the general verdict, inasmuch as the answers do not so far cover all the material issues as to exclude the effect of the general verdict.

The court did right in permitting the appellees to introduce in evidence the certificate and estimates of the engineer. It was proper for the appellees to prove that the engineer had accepted the work, since the contract provided for its acceptance by him, and his certificate was competent evidence of acceptance.

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What we have said in considering the motion for judgment and the complaint disposes of all the questions made upon the instructions.

Judgment affirmed.

Filed May 24, 1892.

No. 15,782.

**HENNEL, GUARDIAN, v. THE BOARD OF COMMISSIONERS
OF VANDERBURGH COUNTY.**

PLEADING.—*Insane Person.*—*Action by Guardian of.*—*Complaint.*—*Conversion of Money.*—*Money Had and Received.*—In an action by the guardian of an insane person against the board of commissioners of a county, a paragraph of complaint is sufficient to withstand a demurrer which shows a wrongful taking by a person who was at the time treasurer of the county, of a large sum of money belonging to the plaintiff's ward, the placing of the same in the county treasury, and a retention and conversion of the money by the board of commissioners. A paragraph for money had and received is likewise good which alleges that the board of commissioners took, received and placed in the county treasury money of the plaintiff's ward (the insanity of the ward and the appointment of the plaintiff as guardian being alleged); that it has kept, and still keeps and retains said money, etc., and that the board of commissioners is indebted to the appellant in the sum so taken, with interest.

TAXATION.—*Property of Person not Adjudged Insane.*—*Notice.*—*Validity of Assessment.*—If a person who has not been adjudged insane owns property subject to taxation, and notice is given him, and the property is assessed by a proper officer, the assessment will at least be *prima facie* valid.

SAME.—*Omitted Property.*—*Invalid Assessment.*—*Recovery of Taxes Collected.*—Under the tax law of 1881 the auditor of a county was not authorized to make assessments of omitted property for any year or years prior to its passage or taking effect. Such a pretended assessment would be void, and the amount of taxes collected under it by levy and sale could be recovered back.

From the Vanderburgh Circuit Court.

J. Brownlee and *W. H. Gudgel*, for appellant.

C. H. Butterfield, for appellee.

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OLDS, J.—This is an action brought by the appellant, Joseph Hennel, guardian of Joseph Froman, an insane person, against the appellee, the board of commissioners of Vanderburgh county. The complaint is in three paragraphs. The action was commenced before the board of commissioners and an appeal taken to the circuit court, where a demurrer was sustained to each paragraph of the complaint and judgment upon demurrer in favor of the appellee, and this appeal is prosecuted and the ruling of the court in sustaining the demurrer to each paragraph of complaint is assigned as error.

Joseph Froman was adjudged insane in 1884, and Joseph Hennel was appointed his guardian in November, 1887.

The first paragraph charges that on the 19th day of November, 1883, while said Froman was insane, and incapable of managing his estate, John J. Hays, who was then and there county treasurer of said Vanderburgh county, wrongfully took possession of \$1,650 of the money of the said Froman and placed the same in the county treasury of said county; that appellee wrongfully accepted and received said money and converted the same to its own use, and still retains and keeps the said money. There are some other allegations as to interest, and as to Froman's continued insanity.

The second paragraph is for money had and received, alleging that the appellee took, received and placed in the county treasury \$1,650 of the money of said Froman, and has kept and still keeps and retains said money so taken from said Froman, and that appellee is indebted to the appellant in the sum so taken, with interest, \$2,150, for money had and received as aforesaid. The paragraph also contains averments as to Froman's insanity, and the appointment of the appellant as his guardian.

We are not favored with any discussion as to the sufficiency or insufficiency of these paragraphs, except on the

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part of counsel for appellant, who assert that the ruling of the court in sustaining a demurrer to them is so clearly erroneous that he will not discuss the sufficiency of them, except to refer to one authority, which he cites, and which has but slight relevancy to the question.

We are not informed on what theory a demurrer was sustained to either of these paragraphs. It does not appear that the money was taken in payment for any taxes, or that the appellant's ward had any property whatever subject to taxation. The first shows a wrongful taking by a person who was at the time treasurer of the county, of \$1,650, and placing the amount in the county treasury, and a retention and conversion of the money by the appellee, the board of commissioners. The second is a count for money had and received. These paragraphs, on their face, are sufficient to withstand a demurrer, and it was error to sustain a demurrer to either of them.

The third paragraph seeks to recover money received by appellee and applied in payment of taxes alleged to have been illegally assessed against the appellant's ward and collected by distress and sale. It is alleged that by proper proceedings in the Vanderburgh Circuit Court, in 1884, Froman was found to be a person of unsound mind, and incapable of managing his own estate, and in 1887 the appellant was appointed his guardian, and is the only legal guardian ever appointed for Froman, and the only person ever having authority to transact his business; that from and prior to 1883, and ever since, said Froman has been of unsound mind; that on the 10th day of November, 1883, the auditor of said county made an unlawful, illegal and wrongful assessment of taxes against the said Froman, setting out a list and statement of the assessment and tax as it appeared upon the tax duplicate, being for each of the years from 1867 to 1882 inclusive, commencing the assessment by assessing \$3,500 worth of property and increasing the value during the years, closing with an assessment for the last year, 1882,

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of \$6,500 of property, assessing in all, for poll and other tax, \$997.10, and adding interest to the amount of \$469.94, making a total of \$1,467.04.

It is alleged that the duplicate was placed in the hands of the county treasurer, who levied upon money to the amount of \$100 in gold and notes due Froman to the amount of \$1,500, and some interest, and that the treasurer sold and converted the notes into cash amounting to \$1,550, together with the \$100 in gold, in all \$1,650, which sum he turned into the county treasury.

It is alleged among other things that the county auditor had no authority or power to make assessment on property for any years prior to 1881. It is further alleged that Froman during all this time was insane, incapable of comprehending a notice or protecting his rights, or appearing before the auditor and showing cause why such assessment should not have been made. There is no averment showing that a notice was not in fact given by the auditor to Froman in relation to the making of the assessment, nor is there any averment that Froman did not in fact own the amount of property assessed for taxation, or that the same had been duly assessed and the taxes paid.

At the time of the assessment Froman had not been adjudged insane. The property of a person, though he be insane, is liable to taxation. If a person who has not been adjudged insane owns property subject to taxation, and due notice is given him, and the property is assessed by a proper officer, the assessment will at least be *prima facie* valid.

The assessment in this case was made by the auditor in 1883, under the tax law of 1881. In the case of *Lang v. Clapp*, 103 Ind. 17, the law of 1881 (section 6416, R. S. 1881) was held to be only prospective, and did not authorize the auditor to make assessments of omitted property for any year or years prior to its passage or taking effect. Under this construction of the statute it follows that the auditor had no authority to make the assessment on the property, which he did for the years

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prior to 1881, and his pretended assessment, having been made without authority of law, was void and without any legal effect. It was held in the case of *Board, etc., v. Armstrong*, 91 Ind. 528, that where a guardian had been duly called upon by the assessor but had not given in the property of his wards for taxation, but fraudulently kept the same from the assessor, and afterwards the property was placed upon the tax duplicate and assessed by the treasurer, the taxes were justly and equitably due, and the guardian having voluntarily paid the same, and afterwards brought suit to recover back the amount so paid, he was not entitled to recover the same. This doctrine has been followed in some subsequent cases.

In the case of *Board, etc., v. Senn*, 117 Ind. 410, it was held that where the auditor increased the assessment on real estate, he had no such authority, and the property-owner had a right to have such illegal taxes refunded.

In the case of *Donch v. Board, etc.*, 4 Ind. App. 374, it was held that where the property-owner gave in to the assessor certain notes and mortgages held and owned by him, placing a total value on them, which the assessor adopted, and afterwards the auditor discovering that there appeared of record mortgages in favor of such person representing a larger sum, and he added to the property so assessed a sum equal to the difference between the mortgage indebtedness as it appeared of record and the valuation fixed by the assessor, and extended the taxes on said sum, which were paid by the property-owner, such assessment by the auditor was illegal, and the property-owner was entitled to recover back the amount of illegal tax so assessed and paid by him.

In this case the taxes for the years prior to 1881 were illegally assessed; they were not voluntarily paid; they were collected by levy and sale of promissory notes, as averred in the third paragraph of complaint. The third paragraph of complaint was at least good to recover back the amount ap-

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plied as payment of the taxes assessed for the years prior to 1881, and it was error to sustain a demurrer to it.

Judgment reversed, with instructions to overrule the demurrer to each paragraph of the complaint.

Filed May 23, 1892.

No. 15,843.

THE BALTIMORE AND OHIO RAILROAD COMPANY v.
BRANT.

JURISDICTION.—*Justice of the Peace.*—*Killing of Stock.*—*Railroad.*—*Summons.*

—*Service.*—In an action before a justice of the peace against a railroad company to recover damages for the killing of stock, it is not essential in order to confer jurisdiction upon the justice that the return of the constable (the writ having been served upon a conductor of the company) shall show that he made the service within his own county. Where the person or individual served resides within the county, or, like conductors of railways, are constantly passing through it, the presumption will be entertained, in the absence of a showing to the contrary, that the officer did not depart from the limits of his jurisdiction.

From the Kosciusko Circuit Court.

J. H. Collins, for appellant.

I. H. Hall and *S. J. North*, for appellee.

MILLER, J.—The appellant brought this action to enjoin the collection of a judgment rendered by a justice of the peace, in favor of the appellee and against the appellant, in an action for killing stock.

The complaint charges that on the 13th day of November, 1889, the defendant filed a complaint with a justice of the peace in Kosciusko county, and caused a summons against the company to issue to a constable of the township, returnable on the 29th day of the month. On the return day of the writ the constable returned the summons with the following endorsement :

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"Served the within writ on June Moore, a conductor on the defendant, the Baltimore and Ohio Railroad Company, and then in the employ of said company as a conductor, by reading to him the within writ, and in his presence and hearing, and delivering to him a certified copy of the within writ, November 13th, 1890."

That there was no other or further return on said writ, and there was no other or further service in said suit before said justice of the peace than that shown by the above return.

The complaint shows that the cause was submitted by the plaintiff in that action to the court for trial, upon a default of the company, and a judgment rendered for the value of the stock. The complaint asserts that this judgment was rendered by the justice without any jurisdiction whatever over either the cause of action or person of the defendant, but that the plaintiff in that action was about to, and would, unless enjoined, proceed to enforce the collection of the same by execution.

A demurrer, filed by the appellee, was sustained to this complaint, and this ruling is assigned as error in this court.

Section 4026, R. S. 1881, gives justices of the peace jurisdiction to hear and determine certain actions where animals have been killed or injured by the locomotives or cars of a railroad, and provides for the service of a summons by copy on any conductor of any train passing into or through the county.

In our opinion the court was not in error in sustaining the demurrer to the complaint.

The return made by the constable was quite as full and specific as that sustained in the case of *Cincinnati, etc., R. Co. v. McDougall*, 108 Ind. 179.

We know, judicially, that the appellant's road passes into and through Kosciusko county, and do not deem it essential to the return of an officer that it should show that he made the service within his own county. Where the person or individual served resides within his county, or, like conductors

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of railways, are constantly passing through it, the presumption will be entertained that the officer did not depart from the limits of his jurisdiction.

The appellant does not assert in the complaint that the service was not, in fact, upon a conductor of appellant's road running into or through the county, nor that the judgment against the company was not just.

We find no merit in this appeal.

Judgment affirmed.

Filed May 23, 1892.

No. 13,776.

JASEPH v. THE PEOPLE'S SAVINGS BANK ET AL.

ATTACHMENT.—*Action Upon Note and Mortgage.*—*Proceedings in Garnishment.*—In an action upon a note and for a foreclosure of a mortgage executed to secure the same, the plaintiff has the right to institute any ancillary proceedings for the collection of the note that he would have had the right to do if the suit was upon the note alone and not coupled with the suit to foreclose the mortgage, and for that purpose he may institute proceedings in attachment and garnishee one of the defendants.

SAME.—*Fraudulent Sale of Property—When Creditors May Garnishee—Assignee.*—When a debtor makes a sale of his personal property subject to execution with the fraudulent intent to cheat, hinder and delay his creditors, and the party to whom it was sold knew or should have known of the fraudulent purpose, and the assignee disposes of the property and converts the proceeds thereof to his own use, he is liable to the creditors of the assignor in proceedings in garnishment for the value of the property so conveyed to and disposed of by him. *Joseph v. Kronenberger*, 120 Ind. 495, overruled.

COFFEY, J., dissents.

From the Vanderburgh Circuit Court.

A. Gilchrist and *C. A. De Bruler*, for appellant.

J. M. Shackelford and *S. B. Vance*, for appellees.

OLDS, J.—This is an action brought by the appellee, the

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People's Savings Bank, against Larkin Fitzgerald, John C. Fares, John V. Fares and the appellant, Simeon Jaseph.

The complaint is in three paragraphs, and if the judgment is sustained it can be only on the third paragraph, and as the paragraphs are not materially different we omit the first and second, and state in brief the contents of the third. It is alleged that the defendants, Fitzgerald, Fares and Fares, by their promissory note, dated the 7th day of August, 1884, agreed to pay the plaintiff, four months thereafter, the sum of \$443.55, with interest thereon at the rate of eight per cent. per annum after maturity, and with attorney's fees (a copy of the note is set out); that no part of said note has been paid; that the sum of fifty dollars is a reasonable attorney's fee for collecting the same, and plaintiff is entitled to recover the same from said defendants.

It is further averred that Fares and Fares are only sureties of defendant Fitzgerald on said note; that on the 1st day of July, 1884, the defendant Fitzgerald made a mortgage to the defendant John C. Fares, upon certain personal property, describing it, to secure the said Fares in the payment of one note of even date therewith for \$1,500, due nine months after date, with seven per cent. interest, and the further sum of \$400 advanced to said Fitzgerald by said Fares, and also to secure said Fares from loss by reason of any further advancements that might be made or any endorsements of said Fares for said Fitzgerald.

At the date of the execution of said mortgage Fitzgerald resided in the county of Henderson and State of Kentucky, and the whole of the property embraced in said mortgage was situate therein. The said mortgage was on the day of its date acknowledged before a notary public, and on said day recorded in the office of the clerk of the Henderson county court, and the law of the State of Kentucky authorizing the recording of the same is set out, and averring that the same was duly and legally recorded, and a copy of the same is set out with this paragraph.

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It is further averred that on the 9th day of December, 1884, the defendant John C. Fares made a mortgage of all the property owned by him to John Kistner and others to secure sundry debts therein named other than the debt of plaintiff herein mentioned, which mortgage was duly acknowledged by him and recorded in the recorder's office of Vanderburgh county; that said debts mentioned in said mortgage executed by Fares, exceeded the amount of the value of said property so mortgaged, and the whole has been exhausted in their payment, and that said Fares is wholly insolvent and has no property out of which plaintiff's said debt, or any part thereof, can be paid; that on the 12th day of December, 1884, the defendant John V. Fares made a mortgage on all of his property to John Kistner and others, securing sundry debts therein named other than the plaintiff's debt herein mentioned, which he duly acknowledged and it was duly recorded in the recorder's office of Vanderburgh county. The debts secured exceeded the value of the property mortgaged, and the property has been exhausted for the payment of said debts, and the defendant John V. Fares is insolvent and has no property out of which the plaintiff's debt, or any part thereof, can be made.

The defendant John V. Fares also, by deed of conveyance on the 10th day of December, 1884, conveyed all his property, being the property mentioned in said mortgage, to the defendant Joseph, in trust for the payment of his debts, which deed of trust was duly recorded in Vanderburgh county; that the defendant Fitzgerald owned no property but that embraced in the mortgage before mentioned made by him to John C. Fares, and has not since that date owned any other property; that said mortgage was made and intended to secure said Fares in any liability he might incur as surety for said Fitzgerald, including the note of plaintiff herein mentioned.

And plaintiff says that it is entitled to be substituted to the rights of said Fares in said mortgage, and to have the

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same foreclosed for its benefit. Plaintiff says that after the execution and acceptance of said deed of trust by said John V. Fares to the defendant Jaseph, and while suit was pending in favor of this plaintiff against said Fitzgerald in the Henderson Circuit Court, in the State of Kentucky, for the foreclosure of said mortgage, and to subject said mortgaged property to the payment of its debts, the defendant Jaseph took possession of the said property, and wrongfully removed it from the State of Kentucky, and now has the same in his possession in this county, or has wrongfully sold and converted it to his own use. Said property was worth six thousand dollars, the premises considered. The plaintiff prays judgment for its said debt and fifty dollars attorney's fees; that the said mortgage be foreclosed, and that the defendant Jaseph be required to deliver up said property to be sold to satisfy said judgment, or to account for the value of said property, and that so much thereof as may be necessary be applied to pay the judgment herein.

Issues were joined on the complaint by the answer of defendant Jaseph. After the commencement of the suit there were also proceedings in attachment commenced and an affidavit in attachment filed, alleging as a ground for attachment "that the defendant Larkin Fitzgerald has sold, conveyed or otherwise disposed of his property subject to execution, with the fraudulent intent to cheat, hinder and delay his creditors;" also, an affidavit in garnishment filed, stating that Simeon Jaseph is indebted to the defendant Larkin Fitzgerald, and that said Simeon Jaseph has the control or agency of certain money of the said defendant Larkin Fitzgerald, which the sheriff can not attach by virtue of the writ issued herein.

Defendant Jaseph answered the garnishee proceedings, denying any indebtedness. The cause was submitted to the court for trial without the intervention of a jury, and the court, by request, made a special finding of facts, and stated its conclusions of law thereon.

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The facts found by the court, in brief, are : A finding of the amount due the plaintiff upon the note ———, \$554 ; that such sum is due without relief from valuation or appraisement laws ; that the mortgage was executed by Fitzgerald to John C. Fares, as stated in the complaint, but as to the debt sued on Fares was principal and Fitzgerald surety, and that such mortgage was not made as collateral security for the payment of the plaintiff's debt, and the plaintiff never had any interest in said mortgage ; that the \$1,500 note which was secured by said mortgage was, prior to October 1st, 1884, purchased by defendant Joseph from defendant John C. Fares for the full value of said note, and said mortgage, in so far as it was security for said \$1,500, was assigned and transferred to said Joseph, who at all times afterwards held the same, and that the same has never been paid, except as it has been paid from the mortgage property or the proceeds thereof ; that at the time of the commencement of this suit all of the property mentioned and described in said mortgage and owned by Fitzgerald had been surrendered to said Joseph under a bill of sale, and said Joseph had taken the same into his possession and removed the same from Henderson county, Kentucky, to Vanderburgh county, Indiana, and that said Joseph, after having taken possession of all of said property had sold and disposed of the same, and converted the proceeds thereof to his own use, and refuses to apply any part thereof to the payment of plaintiff's debt, and claims that the same belongs to him under said sale ; that, on the 10th day of December, 1884, Fitzgerald made a pretended sale of all the property he then had subject to execution to his co-defendant Joseph, and executed and delivered to Joseph a bill of sale, which included the mortgaged property ; that at the time of making said pretended sale Fitzgerald, together with his co-defendants, J. V. and J. C. Fares, was indebted to the plaintiff in the amount hereinbefore found due ; also, to other persons ; that Joseph knew of said indebtedness, and that said bill of sale was executed

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and said sale made by Fitzgerald with intent and with a view and for the purpose of hindering, delaying and preventing the said plaintiff and others from collecting their said debts, or any part thereof, and that said Joseph knew, or ought to have known this fact; that at the time of making said bill of sale under which Joseph claims the property, Fitzgerald and Joseph knew that the defendants, J. V. and J. C. Fares, either had or were about to make to their other creditors assignments, transfers and mortgages to the full value of their property, both personal and real, which they, or either of them, owned subject to execution, and that the said J. C. Fares was then engaged, or had made and did on the same day make a full assignment of all his property to said Joseph, as trustee, for the benefit of his creditors, and as to any unsecured creditors was wholly insolvent; that at the time of the making of the bill of sale of said property by Fitzgerald to Joseph, it was subject to liens to the amount of \$3,332.60, and the remainder of said property above said liens was the property of said Fitzgerald, and that the total value of said property so transferred and taken possession of by Joseph was \$4,000.

The bill of sale set out in the finding fixes the value of said property at \$4,500, and shows a sale of the property by Fitzgerald to Joseph for that amount, and the said Joseph still holds the proceeds of said sale; that Fitzgerald, Fares and Fares are each and all wholly insolvent. And it is further found that Joseph has taken possession of the property, and sold and converted it to his own use, and that it is of the value of \$4,000.

The court states as conclusions of law that the plaintiffs ought not to be subject to any rights under the mortgage, but, under their complaint and the proceedings in attachment, the defendant having taken possession of all the property therein mentioned and converted the same to his own use, in equity and law he is liable, and ought to be required to pay so much of the remaining proceeds thereof to the

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plaintiff as may be necessary to pay the said debt of the sum of \$554 to said plaintiff, and the judgment ought to be rendered against all the said defendants for said sum and the costs of this suit, which is now ordered to be done.

The defendant Jaseph excepted to the conclusions of law. Judgment was rendered in favor of plaintiff against said defendants for the amount due the plaintiffs—\$554.

It is contended by counsel for appellant that the suit is brought for a foreclosure of the mortgage; that under the complaint the plaintiff can have no other relief except a foreclosure of the mortgage. If the proof or the finding of facts do not entitle the plaintiff to that relief it is not entitled to any.

This question must be determined by a few well settled principles. The action upon the note and for foreclosure of the mortgage were properly joined. The plaintiff was not required to bring two actions. Having the right to join the action on the note with the action to foreclose the mortgage, the plaintiff was entitled to judgment on the note, although it failed to establish its right to a foreclosure.

It being a proper suit upon the note, it is manifestly true that the plaintiff would have the right to institute any ancillary proceedings for the collection of the note, which it would have the right to do if the suit was upon the note alone, and not coupled with the suit to foreclose the mortgage, and therefore it was proper, and the plaintiff had the right to institute proceedings in attachment and garnishee the defendant Jaseph. The plaintiff did so and the defendant Jaseph answers to the proceedings in garnishment, and the cause proceeded to trial. We think there can be no question, if the evidence and facts found entitled the plaintiff to a judgment against Jaseph under the attachment and garnishee proceedings, it was proper to render it.

We do not think the rule applies, as contended by counsel for appellant, that a complaint must be good upon some one theory, and the action must be prosecuted upon that the-

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ory alone in this case. The complaint in this case was primarily for judgment upon the note, and attachment proceedings were instituted, and the garnishee-defendant without objection answered and submitted his cause to trial by the court. The cause was prosecuted as much on the theory that it was for personal judgment on the note and judgment against the garnishee as for a foreclosure of the mortgage.

The finding of facts shows that Fitzgerald, on the 10th day of December, 1884, made a sale of all the property he then owned subject to execution, including the mortgaged property, to his co-defendant Jaseph; that at the time of making the pretended sale Fitzgerald, Fares and Fares were indebted to the plaintiff in the sum found due in this case, and were also indebted to other persons; that defendant Jaseph knew of said indebtedness, and that said sale was made by Fitzgerald with intent and with a view and for the purpose of hindering, delaying and preventing the plaintiff and others from collecting their said claims against him, or any part thereof, and Jaseph knew, or ought to have known this fact, and he knew that Fares and Fares either had, or were about to make an assignment of all their property subject to execution for the benefit of certain of their creditors, and that as to unsecured creditors were wholly insolvent, and they did at the time make such assignment. Jaseph took the property by transfer, or pretended sale to him, and not by a foreclosure of a mortgage. The facts found show that Jaseph sold and converted the property to his own use, and held the proceeds of the sale in excess of the liens on the property, such excess amounting to \$667.40. The price stated in the bill of sale as the amount he agreed to pay Fitzgerald is \$1,167.40 in excess of the claims, and the judgment rendered against him was only for \$554.

The facts show a fraudulent transfer of the property by Fitzgerald to Jaseph for the purpose of defrauding the cred-

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tors of Fitzgerald, with knowledge on the part of Joseph of the fraud, making Joseph a party to the fraud.

Under the same state of facts, as in this case, it was held in the case of *Joseph v. Kronenberger*, 120 Ind. 495, that Joseph could not be held as garnishee, but that decision was based upon the theory that by the fraud Joseph did not become indebted to Fitzgerald, nor was any money placed in his hands or under his control belonging to Fitzgerald. The decision in that case was based on the general rule that the creditor stands in the shoes of the debtor, and unless the debtor himself could have maintained an action against the garnishee for the money or the debt, the creditor can not hold him as garnishee. A suggestion is made in that opinion which would indicate that the rights of the creditor, if he had any, must be worked out through a creditor's bill.

It is said in that case that "the facts as found by the court are to the effect that Fitzgerald and the appellant (Joseph) conspired together and perpetrated a fraud, and that it was hurtful to the creditors, and there is evidence tending to support the finding." In that case this general rule, that a creditor stands in the shoes of his debtor in proceedings against a garnishee, and can not recover unless the garnishee is liable in an action in favor of the debtor is applied, overlooking and disregarding the exception to the general rule, which is quite as well settled as the rule itself, and must be regarded as a part of the rule that the creditor may reach the property, in the hands of a garnishee, fraudulently transferred to the latter by the debtor.

The rule is well and correctly stated in 2 Wade Attachments, section 327, as follows: "Before the garnishee can be held liable to plaintiff, two facts must concur: 1. He must be in possession of defendant's property, or be indebted to defendant. 2. Defendant must be indebted to plaintiff. Generally, the defendant must have a cause of action against the garnishee, and the plaintiff must have a cause of action against the defendant, supported by a cause

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for attachment. But the former of these two generally indispensable conditions is subject to an exception which carries with it a flat contradiction of the statement, that the summons places the garnishee in no worse position towards the plaintiff than that occupied by him towards the defendant in attachment. He may be held as garnishee when the defendant has no cause of action against him; when he is neither indebted to defendant, nor in possession of any of defendant's property. It is when the property of defendant has been transferred to him in a manner that is binding on the vendor or donor but is fraudulent and void as against creditors."

In *Waples Attachment and Garnishment*, page 215, it is said: "The plaintiff may reach property in the hands of a garnishee fraudulently transferred to the latter by the defendant. Here is a case where the defendant could not recover the property at law, yet his creditor may; for the fraudulent transfer debars the defendant from suing for it, though it is no estoppel should the plaintiff in an attachment suit seek to reach the property in the transferree's hands by the process of garnishment."

In *Gutterson v. Morse*, 58 N. H. 529, it is held that in attachment the trustee is chargeable for proceeds received by him from his sale of the defendant's chattels which had been fraudulently and without consideration conveyed to him by the defendant. *Proctor v. Lane*, 62 N. H. 457. The same doctrine is held in *Risser v. Rathburn*, 32 N. W. Rep. 198 (Iowa).

Our statute authorizing proceedings in attachment and garnishment is broad enough to authorize the holding of a fraudulent grantee of personal property liable. If the property fraudulently transferred to Jaseph had still remained in his hands it would have been subject to attachment, and could have been levied upon by virtue of the writ, the sale treated as void, and the property ordered sold, but Jaseph had sold and disposed of the property, and converted the

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proceeds thereof to his own use. By his acts he had put it beyond the reach of a writ in attachment, and thus made himself liable as garnishee to account for its value or the proceeds thereof.

It is the purpose of proceedings in garnishment to go beyond those in attachment, and reach that which can not be attached. Section 931, R. S. 1881.

The sale being fraudulent, the property remained the property of the grantor. While he could not maintain an action to recover it by reason of his own fraud, yet his creditors could subject the property to the payment of their claims, and Joseph having put the property beyond their reach, he was liable to the creditors in proceedings in garnishment for its value.

In this case the affidavit in attachment alleged that Fitzgerald had sold, conveyed and otherwise disposed of his property subject to execution, with the fraudulent intent to cheat, hinder and delay his creditors. The affidavit in garnishment alleged that Joseph was indebted to the defendant Fitzgerald, and had in his control money of the defendant Fitzgerald which the sheriff could not attach by virtue of the writ of attachment.

The facts found show that Fitzgerald made a sale of the property to Joseph, and executed a bill of sale in pursuance thereof, the bill of sale showing that the property was sold by Fitzgerald to Joseph at a stipulated price of \$4,500; that the sale was fraudulent, hence Fitzgerald could not sue and recover its value, or the contract price agreed upon. On account of his own fraud he was estopped. The law would not aid him, though the property was subject to being applied to the payment of the claims of creditors. It is further found that Joseph had sold and converted the property to his own use, and that it was of the value of \$4,000; that it is subject to some \$3,300 of liens, leaving a surplus of over \$600, and Joseph is held as garnishee, and judgment is rendered against

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him for the amount of the debt in this case, \$554. The price for which the property was sold, as shown by the stipulation in the bill of sale, was \$4,500, being \$1,167.46 in excess of the amount of the liens.

We think the finding of facts support the conclusions of law.

No motion was made to modify the form of the judgment, and no question is presented as to its form.

A question is presented as to the sufficiency of the evidence to support the finding of facts. We think the evidence is sufficient.

No issue was joined on the attachment proceedings, so that if the amount was due the plaintiff on the note from Fitzgerald, and Joseph as garnishee was indebted to Fitzgerald, or held in his hands moneys belonging to Fitzgerald, the plaintiff was entitled to judgment against him as garnishee.

We think the facts authorized the judgment. So far as the plaintiff was concerned, the property, while it was in the hands of Joseph, was subject to attachment, and Joseph was liable as garnishee for the proceeds thereof or the actual value of the property after conversion. Joseph having sold the property and put it beyond the reach of creditors, and having converted the proceeds to his own use, he was liable for its actual value. Joseph having sold the property and received the proceeds, the proceeds would be treated as belonging to Fitzgerald.

While by reason of the fraud, Fitzgerald could not maintain an action against Joseph, either for the property or its value after conversion, yet, as to creditors, it would be his, and Joseph would hold it in trust for the benefit of creditors, and is liable as garnishee. The rule above quoted, as laid down by Wade, enunciates the true doctrine, that a fraudulent assignee of personal property is liable as garnishee, though he may not be liable in an action brought by the fraudulent assignor, the assignor being estopped by his

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fraud from recovering either the property or its value in case of conversion by the assignee.

It is with some reluctance that we disapprove of the decision in the case of *Joseph v. Kronenberger, supra*, yet we feel constrained to do so rather than perpetuate this erroneous doctrine. The rule we have laid down in this case was not clearly stated or supported by the authorities in the brief of counsel in that case, and hence the rule, without the exception, was declared.

There is no error in the record.

Judgment affirmed, with costs.

Filed May 24, 1892.

DISSENTING OPINION.

COFFEY, J.—I regret my inability to concur in the opinion in this case. As I am unable to do so, it is but fair to my associates, as well as those interested in the case, that I should give the reasons for my dissent.

Section 931, R. S. 1881, provides that "If at the time an order of attachment issues, or at any time before or afterward, the plaintiff, or other person in his behalf, shall file with the clerk an affidavit that he has good reason to believe that any person, naming him, has property of the defendant of any description in his possession, or under his control, which the sheriff can not attach by virtue of such order; or that such person is indebted to the defendant, or has the control or agency of any property, moneys, credits, or effects; or that the defendant has any shares or interest in the stock of any association or corporation,—the clerk shall issue a summons notifying such person, corporation or association to appear at the ensuing term of the court, and answer as garnishee in the action."

Section 939, R. S. 1881, provides that "A garnishee in attachment shall not be compelled in any case to pay or perform any contract in any other manner, or at any other time,

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than he would be bound to do for the defendant in attachment."

The affidavit for a writ of garnishment in this case is in the usual form, no charge of fraud or intimation of fraud on the part of the garnishee being found therein. Had the property, formerly owned by the attachment defendant, been found in his hands I have no doubt that an issue might have been framed involving his right to hold it, including an issue as to whether its transfer was fraudulent or otherwise.

But no property was found in his hands. It had been sold, and the court held him liable for the proceeds, on the ground that the transfer to him by the attachment defendant was made with the intent to cheat and defraud creditors. This finding and judgment was wholly outside of any issue between him and the plaintiff in the attachment. If this is the correct mode of procedure, then I submit that any one who purchases property may, at any time within six years after such purchase, be proceeded against by way of garnishment, and without any intimation or notice that he is charged with fraud, until such charge is developed by the evidence, be held for the proceeds of such property, and required to turn them over to the attachment plaintiff.

The authorities relied upon to sustain such a result are, 2 Wade Attachments, section 327; Waples Attachment, p. 215; *Gutterson v. Morse*, 58 N. H. 529; *Proctor v. Lane*, 62 N. H. 457, and *Risser v. Rathburn*, 32 N. W. Rep. 198. What is said by Wade on Attachments, *supra*, is based upon the case of *Fearey v. Cummings*, 41 Mich. 376, and *Clark v. Brown*, 14 Mass. 271. The case of *Fearey v. Cummings*, *supra*, rests upon a peculiar statute of the State of Michigan (section 6498), which gives the attachment plaintiff the right to question the good faith of a chattel mortgage executed to a garnishee.

In the case of *Clark v. Brown*, *supra*, no question of fraud was involved.

What is said in Waples on Attachment, *supra*, is based

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wholly upon the case of *Gutterson v. Morse, supra*. *Gutterson v. Morse, supra*, rests upon the peculiarity of the statutes of New Hampshire. In that State the person who would be a garnishee in this State is treated as a trustee, and the proceeding against him corresponds more nearly to a creditor's bill than it does to our attachment proceedings. *Proctor v. Lane, supra*, rests upon the same statute.

In the case of *Risser v. Rathburn, supra*, there was a direct issue of fraud made and tried. There was also a finding by the jury, in answer to interrogatories, that the garnishee was indebted to the attachment defendant in the sum of \$488.26 on an agreement to pay the difference between the invoice of certain goods and a debt due from the attachment defendant to the garnishee.

In my opinion these authorities do not fully support the conclusion reached in this case. It must be constantly borne in mind that an attachment proceeding is a stranger to the common law. It exists only by statute, and while a statute may be framed so as to authorize a judgment like the one rendered in this case, in my opinion, our statute does not authorize it.

That the funds in question could have been reached by the creditors of the attachment defendant, in a suit for that purpose, where proper issues involving the question of fraud could have been framed and tried, is too well settled to need argument. *Phelps v. Smith*, 116 Ind. 387; *Goldman v. Bidle*, 118 Ind. 492.

In my opinion this is the only mode by which they could have been reached, inasmuch as the garnishee, under our statute, is treated as a mere stake-holder.

Filed May 24, 1892.

The State, *ex rel.* Hartford, Prosecuting Attorney, *v.* Craig.

No. 15,876.

THE STATE, EX REL. HARTFORD, PROSECUTING ATTORNEY,
v. CRAIG.

MUNICIPAL CORPORATION.—*Councilman Moving into Another Ward.—Vacation of Office.*—Where a councilman is elected from a certain ward in a city, and after his election he moves into and becomes a resident of another ward, he does not by such action vacate his said office, for he is not an officer of the ward from which he was elected, but an officer of the entire city. The statute only provides that he shall be a resident of the ward at the time of his election.

From the Jay Circuit Court.

R. H. Hartford, Prosecuting Attorney, for appellant.

F. H. Snyder and *G. W. Bergman*, for appellee.

McBRIDE, J.—The appellee was duly elected councilman for the Third ward of the city of Portland. He qualified and entered upon the duties of the office. He was, at that time, a resident of said ward, and was otherwise qualified. Afterward he removed from the Third to the Second ward, where he resided when this suit was commenced, which was a proceeding against him in the nature of *quo warranto*. Since his removal he has still assumed to be councilman for the Third ward, and has been acting in that capacity. The only question we are required to decide is, did his removal from the Third ward vacate the office? The court below held that it did not.

The precise question has never heretofore been before this court. Indeed, no authority is cited, and counsel present the question as one of first impression.

The law providing for the incorporation of cities requires that the city shall be divided into wards, and that two councilman shall be elected from each ward by the legal voters of their respective wards. Section 3043, R. S. 1881. The section referred to contains the following provision: "No person shall hold the office of councilman unless, at the time

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of his election, he is a resident of the ward from which he is elected ; and in case of the removal of any councilman from the ward from which he was elected, the common council shall have power to declare his office vacant, and order a special election to fill the vacancy."

It is conceded that the city council has never taken any action in the matter.

The only constitutional restriction upon the residence of officers of municipal corporations is found in Section 6, Article VI of the Constitution, which provides that "All county, township, and town officers shall reside within their respective counties, townships, and towns." The word town is generic, and includes cities. *Flinn v. State*, 24 Ind. 286.

It is, however, competent for the Legislature to impose additional conditions and restrictions not in conflict with any express provision of the Constitution. It may, without doubt, as is done in the statute now under consideration, prescribe that only those shall be eligible for election as councilman who are at the time residents of the ward for which they are elected. We think it equally clear that it may provide that removal from that ward will of itself operate as a vacation of the office. We do not think, however, that it has done so. In our opinion it has not only committed to the city council the power to declare a vacancy in such a case, but it has also left the exercise of that power to the discretion of the council. Until that body has acted, the mere fact of removal to another ward will not of itself have the effect to create a vacancy.

The law providing for the organization and election of boards of county commissioners provides for the division of counties into districts, and that a commissioner shall be elected from each district who shall reside in the district. Section 5732, R. S. 1881.

In the case of *Smith v. State*, 24 Ind. 101, it was held that the statute did not require that a commissioner should continue to reside in the district for which he was elected.

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It is true the statutes are unlike in this, that boards of county commissioners are elected by the vote of the entire county, and not by the vote of the district which they represent, while members of the city council are elected by the votes alone of the voters of their respective wards. But when they are once elected and enter upon the discharge of their official duties, these duties are such as affect alike all portions of the city, and are in no sense local. As is said of the county commissioner in *Smith v. State, supra*, when he assumes the duties of his office: "At that time he takes an oath of office, and assumes duties and a jurisdiction co-extensive with the limits of the county." So the member of the city council, when he takes his oath of office, assumes duties and a jurisdiction co-extensive with the limits of the city. He is not an officer of the ward, but an officer of the entire city.

Judgment affirmed.

Filed May 24, 1892.

 No. 15,819.

BRIGHT ET AL. v. BRIGHT.

PLEADING.—*Fraudulent Conveyance.—Complaint.—Averment as to Other Property.*—In an action by a creditor to set aside a voluntary conveyance, the complaint must allege that at the time of the conveyance the debtor had no other property subject to execution out of which the claim of the creditor could be satisfied.

SAME.—*Implied Trust.—What Complaint Must Aver to Establish.*—In an action to reach property conveyed by a father to his son, no valuable consideration having been paid for the same, and subject it to the satisfaction of a debt subsequently contracted, the complaint, in order to establish an implied trust, must state facts, in the absence of any allegation of fraud, showing that the land was conveyed to the son in trust for the use of the father.

From the Marshall Circuit Court.

Bright *et al.* v. Bright.

J. D. McLaren and *E. C. Martindale*, for appellants.
C. Kellesin, for appellee.

ELLIOTT, C. J.—This suit was brought by the appellee to subject land to the lien of a judgment obtained by her against Richard Bright.

The appellee alleges in her complaint that she secured a decree of divorce from Richard Bright on the 15th day of November, 1889, and that she also obtained a judgment for alimony in the sum of two hundred dollars; that an execution was issued and returned unsatisfied; that at the time the judgment was rendered Richard Bright had no property subject to execution except a house and lot of the value of two hundred and fifty dollars; that he was the real owner of the property; that it was purchased with his money on the 9th day of May, 1889; that he caused the deed therefor to be executed to his son, Edward C. Bright; that the son paid no consideration for the conveyance; that prior to the time of executing the conveyance Richard Bright placed in the hands of his son seven hundred dollars; that this sum was to be held by the son for his father's use; that Richard Bright caused the conveyance to be made while he and the appellee were husband and wife, "and for the purpose of preventing the plaintiff from realizing anything on any judgment for alimony she might recover against him in divorce proceedings then anticipated by said defendant," and "to prevent the plaintiff, as a subsequent creditor by reason of her judgment for alimony as aforesaid, from collecting her lawful claims and judgment by the sale of such real estate on execution."

The complaint is a peculiar one, and lacks many of the averments necessary to make it good as an ordinary complaint to set aside a fraudulent conveyance. If it is to be regarded as such a complaint it is clearly bad.

Our statute provides that no conveyance shall "be adjudged fraudulent as against creditors or purchasers, solely

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on the ground that it was not founded on a valuable consideration." Section 4924, R. S. 1881. It has been held in many cases that a voluntary conveyance will not be set aside unless it affirmatively appears that, at the time of its execution, the grantor had no other property subject to execution, out of which the claim of the creditor could be satisfied. *Shew v. Hews*, 126 Ind. 474; *Sell v. Bailey*, 119 Ind. 51, and cases cited; *Phelps v. Smith*, 116 Ind. 387. The authorities, indeed, go further, for even where there is a fraudulent intent, still, if the debtor retains sufficient property to pay his debts, the conveyance will not be set aside. *Rice v. Perry*, 61 Maine, 145; *Phelps v. Smith*, *supra*, and cases cited; Wait Fraudulent Conveyances, section 143. There is here no averment that there was not sufficient property left in the grantor to pay all his debts. For anything that appears the grantor may have had much more property subject to execution than was necessary to satisfy creditors, and if so, he had a right to have the property conveyed to his son, and was not guilty of fraud in having the conveyance executed to him. There are other defects in the complaint, if it be treated as a complaint to set aside a fraudulent conveyance, but it is unnecessary to notice them.

Counsel for the appellee say of the complaint, that "It was intended to be, and is, an application to reach property held in trust for the satisfaction of a debt subsequently contracted, under the provisions of section 4921, R. S. 1881." The section of the statute referred to reads thus: "All deeds of gift, conveyances, transfers, or assignments, verbal or written, of goods or things in action, made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent, of such person." Accepting as correct the decision in *Plunkett v. Plunkett*, 114 Ind. 484, that this provision applies to land as well as to personal property, we will inquire and ascertain whether the allegations of the complaint show that Edward C. Bright received and holds the land in trust for his father's use.

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There is no allegation that Edward C. Bright received the land as a trustee, nor is there any allegation that his father caused it to be conveyed to him in trust. It is averred that the property "was paid for out of the money of the said Richard." We do not think this sufficient to bring the case within the statute. If the father had paid for the property directly, taken a deed to himself and then conveyed it to the son, it is very clear that in the absence of fraud, the son would have acquired title. The fact that the father caused the conveyance to be made directly to his son, can not, of itself, defeat the latter's title. The mere fact that the father paid the consideration is not of itself sufficient to show that the son took the property in trust for the use of his father. It was incumbent upon the appellee to aver that the grantee took the property in trust for the use of the grantor. A trust does not arise by implication in favor of creditors where, as here, a father pays the consideration for property and causes the conveyance to be made to his son. To give the statute such a construction would do violence to settled principles and produce great injustice. In order to bring the case within the decision of *Plunkett v. Plunkett, supra*, the property must be conveyed to the use of the debtor. The doctrine of that case is one to be limited rather than extended. It can not be made to apply to this case without extending it, and we are by no means willing to extend the doctrine of that case. If the property is held for the use of the grantor it is just that it should be subjected to the claims of his creditors, but unless it clearly and affirmatively appears that the property is held in trust for the use of the person making a deed, or causing a deed to be made, there can be no equity or justice in subjecting it to the claims of creditors, where there is no fraud or wrong on the part of the debtor or his grantee; where, however, the property is held in trust for the use of the person who pays for it, the real, beneficial ownership is in him, and a mere naked right in the trustee, so that it is consistent with principle to assist cred-

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itors in subjecting it to the payment of their claims against the person who buys the property for his own use, but has it conveyed to another for that use. The complaint before us does not make such a case for the reason that it does not state facts showing that the land was conveyed to the son in trust for the use of the father.

It is true that where one entrusted with the money of another buys property with that money he takes it as trustee for the person whose money pays for the property if in buying he has made a wrongful use of the money entrusted to him. But this rule of equity has here no relevancy, for the plain reason that the son did what the father desired. The father had a right to cause the conveyance to be executed to his son, unless in so doing he wronged his creditors, but he could not and did not wrong his creditors, for it does not appear that the trust was created to the use of the donor. The presumption always is in favor of good faith, and this presumption requires the conclusion that the transaction was, what it professes to be, an honest one, and that the deed is, what it purports to be, a conveyance of the whole interest, legal and equitable, to the son, leaving no interest in the father. It is manifest that the effect of this presumption can only be broken by a clear and direct averment that the son took the land in trust to the use of the father.

The evident purpose of the statute in prohibiting the creation of a trust to the use of the creator was to prevent the donor from holding the substantial and beneficial title, and yet wronging his creditors by keeping the property from them by means of the normal trust. Where there is no purpose to hold the property in this mode there can be no wrong of which creditors can complain, except in cases where the donor at the time of creating the trust has no property subject to execution, or creates the trust with the corrupt purpose of injuring his creditors. It is true that a debtor can not be generous at the expense of his creditors, and whether he makes a gift by way of trust, or by a direct conveyance,

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the gift will be inoperative as against creditors, if at the time of making it, the donor was guilty of positive fraud or had no other property subject to execution, but it is equally true that where there is a gift it is valid if there is no fraud and the donor has property subject to execution sufficient to satisfy the demands of creditors, whether the gift be by way of trust or by a direct conveyance to the donee. Where, however, there is a mere semblance of a gift, as where one has land conveyed to another in trust to his own use, the creditors may subject the property to the payment of their claims, since, in such a case, there is really no gift because the donor retains the real, substantial interest and the trustee obtains a mere apparent or nominal interest. The complaint before us does not state facts showing that the grantee obtained a mere nominal or apparent interest, but, on the contrary, the facts stated require the conclusion that he acquired the entire real and substantial interest. If this was the interest acquired it was quite clear that the conveyance must stand, since there are no facts pleaded impressing upon it a fraudulent character.

We are referred to the case of *Bishop v. Redmond*, 83 Ind. 157, but that case does not sustain the appellee's contention. In the case referred to there was a direct averment of a fraudulent purpose on the part of the grantor and the grantee, and that a conspiracy was formed between those parties to defraud the plaintiff in that suit. That averment, or, to be more accurate, the facts stated, showed the existence of a positive fraud, and thus brought the case within the rule that where there is actual fraud on the part of the grantor and grantee the conveyance may be avoided by subsequent creditors. It is to be remarked that a conveyance is not voidable at the suit of subsequent creditors, unless there was positive or actual fraud. *Stumph v. Bruner*, 89 Ind. 556; *Pennington v. Flock*, 93 Ind. 378; *Barrow v. Barrow*, 108 Ind. 345. But the case of *Bishop v. Redmond*, *supra*, is not of the same class as the present, for according to the re-

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peated assertions of appellee's counsel, the complaint before us proceeds upon the theory that the land is subject to sale on the appellee's judgment because, as it is assumed, the land was conveyed to the son in trust to the use of the father. If the complaint is not good on that theory it can not be upheld. *Mecall v. Tully*, 91 Ind. 96, and cases cited; *Montgomery v. Craig*, 128 Ind. 48 (49), and cases cited.

The court erred in overruling the demurrer to the complaint.

Judgment reversed.

Filed May 24, 1892.

No. 15,810.

TANGUEY v. O'CONNELL.

MARRIED WOMAN.—Interest of in Husband's Lands.—When Divested by Judgment.—A judgment rendered against a married woman and her husband, quieting the title to land owned by the husband during coverture, but which prior to the action he alone conveyed, is binding on the wife after the husband's death, and prevents her from recovering the interest in the property given by section 2491, R. S. 1881. *Curren v. Driver*, 33 Ind. 480, overruled.

From the Pulaski Circuit Court.

W. L. Agnew and *B. Borders*, for appellant.

W. Spangle and *J. M. Spangle*, for appellee.

MILLER, J.—The appellant brought this action against the appellee for the partition of a tract of real estate.

The errors assigned are the rulings of the court in overruling the demurrer to the first paragraph of answer, and sustaining the demurrer to the second paragraph of reply.

There is but a single question of law presented in these rulings, viz.: Is a judgment rendered against a married woman and her husband quieting the title to land owned by the

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140	610
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husband during coverture, but which he has, prior to the bringing of the action, conveyed by a deed, in the execution of which the wife did not join, such an adjudication as to bind the wife, after the death of the husband, and prevent her from recovering the interest in the property given by section 2491, R. S. 1881, which provides that a surviving wife is entitled to one-third of all the real estate of which her husband may have been seized at any time during the marriage, in the conveyance of which she may not have joined?

The solution of this question depends largely upon the nature of the interest or estate of the wife in the lands owned by her husband during his life.

Whatever doubts and uncertainties may have existed upon that subject was set at rest by the well reasoned case of *Bever v. North*, 107 Ind. 544, where it was held that in this State the wife's interest in her husband's real estate is an estate in the land itself, and not a mere encumbrance resting upon it.

A strong legislative recognition of the substantial nature of her estate is evidenced by the enactment of section 2508, R. S. 1881, which provides that this inchoate interest shall vest upon the judicial sale of real property, and give her the immediate right of absolute ownership and possession.

It has also been held that a wife is a proper party, at least, to the foreclosure of mortgages upon lands owned by the husband. *Watt v. Alvord*, 25 Ind. 533; *Holland v. Holland*, 131 Ind. 196.

If not made a party her right to redeem is not cut off. *May v. Fletcher*, 40 Ind. 575.

It would be a harsh doctrine that would refuse the assistance of the courts of the land to a married woman whose husband has conveyed the land, in which she has a valuable estate, for the preservation of that estate from destruction, and this would be the logical result of the argument pressed upon us by the appellant.

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The right to sue, and the liability to be sued, go hand in hand.

The appellant cites and relies upon the case of *Curren v. Driver*, 33 Ind. 480.

In that case a husband and wife executed a mortgage, without covenants of warranty, on land of which neither of them at the time had title. Afterward the husband acquired title. The mortgage was subsequently foreclosed, both husband and wife being made parties defendants. A judgment on default was rendered and the land sold. Six years after that time the husband died, and his widow sued for the third of the land. It was held that the judgment of foreclosure did not bar the wife. We are of the opinion that this case was wrongly decided. It is apparent that the wife had a defence to the action, if she had appeared, but having suffered default and judgment to be taken against her, she should have been concluded. It would be little use to make a married woman a party defendant to a foreclosure suit if a judgment rendered in the action may be wholly disregarded and treated as absolutely void. This can hardly be called a collateral attack upon a judgment, but a collateral disregard of a judgment.

We regard the law as well settled that a complaint to quiet title challenges, as the defendants assert, whatever title, interest or estate they claim in the premises, and if they fail to do so they are concluded by the decree, and the property is freed from all claims of whatsoever nature existing at the time of the institution of the suit. *Davis v. Lennen*, 125 Ind. 185; *Watkins v. Winings*, 102 Ind. 330; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581; *Faught v. Faught*, 98 Ind. 470; *Ragsdale v. Mitchell*, 97 Ind. 458; *Farrar v. Clark*, 97 Ind. 447; *Cooter v. Baston*, 89 Ind. 185; *Green v. Glynn*, 71 Ind. 336; *Davis v. Barton*, 130 Ind. 399.

The law favors the prompt settlement of conflicting claims to real estate, and the liberal provisions made for settling such disputes by actions to quiet title have been brought into

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favor. We would be reluctant to sanction a doctrine that would greatly impair the effectiveness of this procedure.

We are of the opinion that the court did not err in its rulings.

Judgment affirmed, with costs.

Filed May 24, 1892.

No. 16,514.

CROSS v. THE STATE.

CRIMINAL LAW.—Appointment of Counsel for Defendant—Poor Person.—

When the defendant possessed means to employ counsel for his defence, it was not error for the court to refuse to permit him to defend as a poor person.

SAME.—Fixing Imprisonment in Penitentiary.—The objection that the jury fixed the punishment of defendant at imprisonment in the "penitentiary" instead of the State prison is an objection of a technical character, for which reversal of the judgment is forbidden by statute.

SAME.—Rape.—Evidence.—Conversations With Prosecuting Witness.—Effect of Striking Out.—A defendant who is convicted in a prosecution for rape can not complain of the admission of the testimony of witnesses relating to conversations with the prosecuting witness, soon after the alleged crime, when such conversation was struck out by the court and wholly withdrawn from the jury. It was proper to prove that she made complaint soon after the occurrence, as corroborative of her testimony, but it was not proper to permit the witnesses to give a detailed statement of what she said.

SAME.—Instructions to Jury—Rape—Nature and Extent of Resistance.—An instruction to the jury in a prosecution for rape is proper which informs them that the nature and extent of resistance which ought reasonably to be expected in each particular case must necessarily depend upon the particular circumstances of the case, and that no general rule can be laid down upon the subject.

SAME.—Instruction to Jury.—Reasonable Doubt.—In the absence of any instruction defining a reasonable doubt, and in a case where the verdict is not so clearly right that an erroneous instruction can be disregarded, a judgment of conviction will not be upheld where the whole tenor

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of the special instruction upon the subject of reasonable doubt was to constantly admonish the jury against entertaining unreasonable doubts, while there was no corresponding admonition against convicting the defendant if a reasonable doubt of his guilt should exist. For instruction, see opinion.

From the Huntington Circuit Court.

C. W. Watkins and *J. C. Branyan*, for appellant.

W. A. Branyan, Prosecuting Attorney, and *M. L. Spencer*, for the State.

COFFEY, J.—The first count in the information in this cause charges the appellant with an assault and battery upon one Elizabeth Adams, with the felonious intent to commit the crime of rape; and the second count charges him with the crime of rape upon the same person.

A trial of the cause by a jury resulted in a verdict of guilty, fixing his punishment in the "penitentiary" for the period of twelve years, upon which the court, over a motion for a new trial, rendered judgment.

Numerous alleged errors are assigned in this court, upon which a reversal of the judgment of the circuit court is sought.

The circuit court did not err in refusing to permit the appellant to defend as a poor person. His examination, in open court, disclosed the fact that he was not a pauper. He possessed means with which to employ counsel for his defense, and there being no necessity for it, he should not have been permitted to defend at the expense of the public treasury.

The objection that the jury fixed the punishment of the appellant at imprisonment in the "penitentiary" instead of the State prison is an objection of a technical character for which we are forbidden by statute to reverse judgment.

Nor is the appellant in a condition to complain of the testimony of witnesses relating to conversations with the prosecuting witness soon after the alleged crime, inasmuch as

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such conversations were struck out by the court and wholly withdrawn from the jury. It was proper to prove that she made complaint soon after the occurrence, as corroborative of her testimony, but it was not proper to permit the witnesses to give a detailed statement of what she said. The proper practice in such cases is indicated in the case of *Thompson v. State*, 38 Ind. 39.

It was assigned as a reason for a new trial that the circuit court erred in giving certain instructions to the jury at the request of the State and over the objections of the appellant, and also in modifying certain instructions asked by the appellant.

There is a total absence from the record of any instruction defining a reasonable doubt. As the court gave general instructions, however, upon the subject of reasonable doubt, if the instructions given were free from error, we would not reverse the judgment for this reason, as the appellant did not ask any special instructions of this character. While there are no instructions defining reasonable doubt, there are several found in the record informing the jury as to what does not amount to a reasonable doubt. It is of these instructions that the appellant complains.

As instructions are not to be construed in detached portions, but, on the contrary, are to be construed together, it is necessary that we should group those bearing upon the subject under investigation. So much of the instructions as undertake to inform the jury what does not constitute a reasonable doubt are as follows:

"The court instructs the jury, as a matter of law, that the doubt which a juror is allowed to retain in his own mind, and under which he should frame a verdict of not guilty, must always be a reasonable one; a doubt produced by undue sensibility in the mind of the juror in view of the consequences of his verdict is not a reasonable doubt, and a juror is not allowed to create sources or material for doubt by resorting to trivial or fanciful suppositions and remote

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conjectures as to a possible state of facts differing from that established by the evidence. You are not at liberty to disbelieve as jurors, if you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered."

"2. It is not my intention by the words 'reasonable doubt' to declare that a bare possibility of innocence will acquit, because that may be true in nearly all cases; what I wish to be understood as saying is this, when a circumstance is of doubtful character in its bearings, you are to give the accused the benefit of the doubt; if, however, all the facts established necessarily lead the mind to the conclusion that the defendant is guilty, though there be a bare possibility, namely, not supported by some good reason therefor, that he is innocent, you should find him guilty.

"3. I instruct you that while it is the duty of each individual juror to be satisfied in his own mind of the guilt of the accused before he agrees to a conviction; his duty to the State, to society, and to himself is equally sacred to hold for conviction if he has an abiding satisfaction of the defendant's guilt; and if, after due deliberation, no juror is possessed of any good reason to doubt the defendant's guilt it is the duty of the jury to convict, for the rule of law that throws around the defendant the presumption of innocence beyond a reasonable doubt is not intended to shield those who are actually proven guilty from a just and merited punishment."

In view of the well-beaten path, clearly marked out by a long line of carefully adjudicated cases, defining what is and what is not a reasonable doubt, it is, perhaps, safer to follow the well considered and approved precedents than undertake to make new ones at the risk of erring to the injury of those whose liberty is at stake. The cases, defining what is a reasonable doubt, and declaring what is not such a doubt, are so numerous and so easy of access that with the use of diligence they can readily be found. The nearest precedent for any

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of the instructions above set out, cited by counsel, is found in the case of *Wall v. State*, 51 Ind. 453.

What is said by the court in relation to the instruction therein set out seems to be unobjectionable, but it appears that the whole scope of the instruction was not considered. In the case of *Rhodes v. State*, 128 Ind. 189, a similar instruction was held erroneous. In that case the court said: "Men may feel that a conclusion is necessarily required, and yet not feel assured beyond a reasonable doubt that it is a correct conclusion. Life and liberty can not be taken where evidence does no more than necessarily lead to a conclusion. * * It is, however, not necessary that the evidence should produce absolute certainty in the minds of the jurors, or that it should dissipate mere conjectures and speculative doubts. * * It is often true that a preponderance of the evidence will necessarily lead the mind to a conclusion, but where human life or liberty is at stake, reasonable doubt must be removed, and the removal of reasonable doubt is not always essential to a necessary conclusion. A necessary conclusion may logically appear to result, and yet all reasonable doubt be not removed."

It is immaterial whether the doubt is to be removed by direct or circumstantial evidence, since in every case all reasonable doubt must be removed by the evidence in the cause before the accused can be convicted. No preponderance of evidence, however great, is sufficient, whether direct or circumstantial, unless it generate full belief of guilt to the exclusion of all reasonable doubt. The whole tenor of the special instructions upon the subject of reasonable doubt is to constantly admonish the jury against entertaining unreasonable doubts while there is no corresponding admonition against convicting the appellant if a reasonable doubt of his guilt should exist.

This is not a case in which we can say that the verdict is so clearly right that we can disregard an erroneous instruction. The conviction rests mainly upon the testimony of

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the prosecuting witness. Upon the commission of the act alleged against the appellant, she is contradicted by both her mother and the appellant. Under such circumstances, to sustain the verdict the instructions should be free from error by which appellant could be prejudiced.

In the absence of some instruction defining a reasonable doubt, the giving of the instruction which we have set out above was error, which probably injured the appellant, and for which the judgment should be reversed.

The court did not err in modifying the instructions asked by the appellant.

In the case of *Anderson v. State*, 104 Ind. 467, it was said: "The nature and extent of resistance which ought reasonably to be expected in each particular case, must necessarily depend very much upon the peculiar circumstances attending it, and it is hence quite impracticable to lay down any rule upon that subject as applicable to all cases involving the necessity of showing a reasonable resistance."

The modifications complained of consist in requiring the instructions asked by the appellant to conform to the rule above announced.

There are some other questions presented by the record and argued by counsel in their briefs in this case, but as they may not arise upon another trial of the cause we deem it unnecessary to decide them.

For the error of the court in the matter herein indicated, the judgment of the circuit court must be reversed.

Judgment reversed, with instructions to grant a new trial, and for the necessary order to return the prisoner.

Filed May 24, 1892.

No. 15,399.

FRAZIER ET AL. v. MYERS ET AL.

EASEMENT.—Right of Way.—User.—Construction Placed Upon Contract by Parties.—Adoption of by Court.—Where a deed reserved a right of way, and provided that the same should not be fenced, and for forty years it had been maintained with gates placed across the way “at each terminus thereof,” such a construction has been given the provision in the deed as precludes any of the parties from insisting that the way shall be kept entirely open, without gates at either end. The deed refers to the way as an existing one, and means, as the acts of the parties covering a period of many years clearly show, a private way, protected by gates at each end, to be opened only for the purpose of using the way. Where parties give their contract a construction, the courts will adopt that construction, and hold the parties to it.

From the Dearborn Circuit Court.

N. S. Givan and *J. K. Thompson*, for appellants.

G. M. Roberts, *C. W. Stapp*, *H. D. McMullen* and *W. R. Johnston*, for appellees.

ELLIOTT, J.—The second paragraph of the appellees' complaint contains these allegations: That the appellees became the owners of the real estate described subsequent to the 18th day of February, 1864; that on that day the land was owned by John Frazier, Daniel Frazier and Frederick Barringer, as tenants in common; that in a partition of the land deeds were executed by these persons; that one of the deeds was executed to Daniel Frazier by John Frazier and Daniel Barringer; that for a long time prior to the execution of the deed there had existed a private right of way appurtenant to the land, and it had been used by the owners and occupants thereof; that the way is still used by the appellants; that it leads to a highway, and extends across an enclosed field; that gates had been placed across the way “at each terminus thereof,” and there maintained for more than twenty years; that in the deed conveying the land a reservation of the right of way was duly made; that

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152	154
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158	485

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the appellants have left the gates open and unfastened; that they claim a right to keep the way open; that their wrongful acts in so doing have caused and will cause, unless they are prevented by an injunction, serious injury to the appellees.

We must act upon the allegations of the complaint as confessed by the demurrer, and these allegations make it appear that, by the long continued user and by the acts of the parties, such a construction has been given the deed as precludes the appellants from insisting that the way shall be kept entirely open. The right of the parties, upon the case made by the complaint, is to a private way, but not to an entirely open way, inasmuch as the facts pleaded show that the way is to be closed at either end by gates to be opened only for the purpose of using the way. The construction given the grant by the parties is the one upon which the courts must act in such a case as that made by the complaint. Where parties give their contract a construction, the courts will adopt that construction and hold the parties to it. *Johnson v. Gibson*, 78 Ind. 282; *Reissner v. Oxley*, 80 Ind. 580; *Willcuts v. Northwestern, etc., Ins. Co.*, 81 Ind. 300; *Aetna Life Ins. Co. v. Nexsen*, 84 Ind. 347; *Vinton v. Baldwin*, 95 Ind. 433; *Louisville, etc., R. R. Co. v. Reynolds*, 118 Ind. 170; *Chicago v. Sheldon*, 9 Wall. 50.

The facts stated in the special finding make a stronger case for the appellees than the complaint does, for the special finding shows the mode in which the way was maintained and used for more than forty years to be that which the appellees contend is the one in which it is to be used and maintained. The appellants, however, contend that the words of the grant convey a right to a road without gates or obstructions of any kind. The words of the deed are these: "Said John D. Frazier, reserving the right of way, wagon way, where the road now lies through the aforesaid forty-five acres; said road not to be fenced." We think that if there were no contemporaneous exposition of the deed by the acts

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of the parties, the contention of the appellants could not prevail. If their construction is correct, then there can be no fences, lateral or transverse, and the lands of the servient owner would be left entirely open and exposed on every side, and this, it is evident, was not the intention of the parties. We think it very clear that what was meant was that the way should not be closed at the ends by a permanent fence, and that there was no intention to permit the way to remain entirely open. The deed refers to the way as an existing one, and means, as the acts of the parties covering a period of many years clearly show, a private way, protected by gates at each end. In the absence of a contract forbidding it, the owner of the servient estate would have a right to swing gates across the way. *Phillips v. Dressler*, 122 Ind. 414. The usage under the contract shows that the parties had in mind, from first to last, a way closed by gates conveniently arranged for opening when necessary to permit a use of the way.

We are satisfied that the law is entirely with the appellees upon the merits of the case.

Judgment affirmed.

Filed June 9, 1892.

No. 15,802.

THE BOARD OF COMMISSIONERS OF VIGO COUNTY v. DAILY.

COUNTY.—Liability for Negligence of its Officers.—In an action for damages alleged to have been occasioned by the negligence and carelessness of the county commissioners in the care and control of a court-house, the county is not liable. It can not be held liable for the negligence of its agents or officers, unless made so by statute.

From the Parke Circuit Court.

I. N. Pierce, G. W. Faris and S. R. Hamill, for appellant.

J. E. Lamb, C. McNutt and J. G. McNutt, for appellee.

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137	406
138	611
132	73
143	28
142	575
132	73
144	113
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100	12
132	73
170	608

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MILLER, J.—The appellee brought this action against the appellant to recover damages for a personal injury occasioned by the alleged negligence and carelessness of appellants, in the care and control of the court house of Vigo county.

Several errors have been assigned, and are discussed by counsel, but we regard the question of law presented by the ruling upon the demurrer to the complaint as decisive of the action.

It is now well settled that counties are involuntary corporations, organized as political subdivisions of the State for governmental purposes, and not liable, any more than the State would be liable, for the negligence of its agents or officers unless made liable by statute. *White v. Board, etc.*, 129 Ind. 396; *Smith v. Board, etc.*, 131 Ind. 116; *Morris v. Board, etc.*, 131 Ind. 285; *Abbott v. Board, etc.*, 114 Ind. 61; *Board, etc., v. Boswell*, 4 Ind. App. 133; *Shepard v. Pulaski Co. (Ky.)*, 18 S. W. R. 15; *Downing v. Mason Co.*, 87 Ky. 208; *Hite v. Whitley Co.*, 15 S. W. R. 57; *Elliott Roads and Streets*, 323.

There may be little distinction between the duties imposed upon boards of commissioners in the care and management of bridges, and of public buildings; but, while we regard the liability of counties for negligence in failing to keep bridges in repair as well settled, we recognize the fact that the weight of authority is the other way (*Board, etc., v. Chipps*, 131 Ind. 156; *Elliott Roads and Streets, supra*), and are not disposed to extend the rule so as to embrace other cases. *Smith v. Board, supra*; *Green v. Harrison Co.*, 61 Iowa, 311.

In our opinion the court erred in overruling the demurrer to the complaint.

The judgment is reversed, with instructions to sustain the demurrer to the complaint.

Filed June 7, 1892.

Dillen *et al.* v. Johnson *et al.*

16,342.

DILLEN ET AL. v. JOHNSON ET AL.

FRAUDULENT CONVEYANCE.—Husband and Wife.—Transfer of Property to Wife.—Valid Indebtedness.—Rights of Creditors.—Where a husband, when he was perfectly solvent, and long before the debt in suit was contracted, gave his wife a sum of money which she kept for several months and then loaned to him, under an agreement that he would repay it, and he transferred to her an interest in a farm in payment thereof, her said interest can not be subjected to the payment of her husband's indebtedness.

From the Miami Circuit Court.

J. Mitchell and *C. A. Cole*, for appellants.

R. Magee, *G. W. Funk*, *N. N. Antrim*, *J. N. Tillett* and *M. Winfield*, for appellees.

OLDS, J.—This action was brought by the appellee John F. Johnson, as cashier of the State National Bank of Logansport, Ind., to recover a judgment against David M. Dillen and Jacob Hershberger on a note and to subject the interest of Eva E. Dillen, wife of David M. Dillen, in certain real estate to the satisfaction of said judgment. It is alleged in the complaint that the real estate sought to be charged was purchased with the means of David M. Dillen and Oren E. Dillen, and the title to the interest purchased by David M. Dillen was taken by him in the name of his wife, Eva E. Dillen, for the purpose of defrauding the creditors of said David M., the said Eva E. paying no part of the consideration.

Upon proper request the court made a special finding of facts and stated conclusions of law in favor of the appellee Johnson, and judgment was rendered subjecting the land to the payment of the judgment. The only question presented, relates to the sufficiency of the evidence to sustain the eighth finding of facts, which finding is essential to sustain the conclusion of law, and is as follows:

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159	619
132	75
160	697

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" 8th. I do further find that the said Eva E. Dillen paid no part of the consideration for said land, and that the conveyance to her was the voluntary conveyance made by her husband, David M. Dillen, with the fraudulent intent to cheat, hinder and delay his creditors."

We are not pointed to any evidence in the record by counsel for the appellee which sustains this finding, and we have read the evidence and find none which we think tends to support the finding. The appellants, David M. and Eva E. Dillen, testify that long prior to the time the debt sued upon was contracted, David M. owned a farm in Carroll county, Indiana, and that he sold it for \$35,000. He owned some other property which he disposed of. At the time he sold the farm he agreed to give to his wife, Eva E., \$1,000, and soon after the sale he did give her \$1,000 in cash, to be her absolute property, with the expectation that she should use it in the purchase of a home for herself and children. Dillen and wife were at the time contemplating going to California. Afterwards they did go to California and remained several months and returned, Mrs. Dillen retaining the \$1,000 in her own possession, carrying it upon her person on her trip to the West. After they returned from the West to Indiana, Mrs. Dillen loaned the money to her husband to be invested in her name in Kansas land. There was a failure to consummate the trade or purchase of the land in Kansas as contemplated, and Mr. Dillen, her husband, returned to this State again, and invested the \$1,000 in the purchase of a livery stable in the city of Logansport, with an agreement between him and his wife to repay to her the money whenever she desired it to purchase a home. At the time Mr. Dillen gave his wife the money, and at the time of the agreement and the investment in the purchase of the livery stable, his sole indebtedness was \$1,120, which he owed his brother, Orin E. Dillen, who also purchased an interest in the livery stable and became his partner, each owning at first one-fourth interest. Afterwards Orin became the owner of three-fourths of the livery stable. During the time he owned the

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livery stable David M. became indebted and liable for the debt in suit. Afterwards he and his brother made a trade of the livery stable for the farm in question, situate in Miami county, also trading with the livery stable a horse and buggy belonging to the appellant Mrs. Dillen. They took the title to the land in the name of Orin E. Dillen and Eva E. Dillen by agreement with her that the title should be so taken in payment of \$1,000 loaned by Mrs. Dillen to her husband, and that she would move upon the farm. The farm was valued at \$2,500, and David M. Dillen transferred as part payment \$2,400 of notes which were yet due him from the sale of the farm in Carroll county, and it is stated by the witnesses that David M. was owing his brother, Orin E., \$800, and that this sum was agreed to be adjusted by Orin E. having a greater interest to this amount in the Miami county farm.

There is no controversy as to the law of the case. The testimony of the parties as to the fact that David M. gave his wife the money, and the manner in which he received it back under an agreement to repay her, and that the interest in the farm in controversy was transferred to her in payment of the same, is not controverted by any evidence in the case. We regard as undisputed facts, that the husband gave to his wife \$1,000 when he was perfectly solvent, long before the debt in suit was contracted; that she had the money in her own possession for months, and finally loaned the same to her husband under an agreement that he would repay it, and this \$1,000 due her and her horse and buggy went into the purchase of the farm in question, and the title was taken by her in payment of it.

This being true, there is an entire want of evidence to support the eighth finding of fact. She was entitled to protection in so far as she had a valid interest in the land.

There is evidence tending to show that the husband paid part of the consideration for the farm, and from which it might be inferred that he did so to defraud creditors. The

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creditors may have a remedy, and the right to reach the surplus in the land above the valid interest of the wife, which the husband may have caused to be put in the name of his wife to defraud creditors, and which she would hold in trust for the creditors, but the wife has the right to be protected in so far as she has a valid interest. *Blair v. Smith*, 114 Ind. 114.

The conclusion we have reached leads to a reversal of the judgment.

Judgment reversed, with instructions to grant a new trial.

Filed April 2, 1892; petition for a rehearing overruled June 8, 1892.

132	78
132	201
132	78
152	469

No. 15,858.

**BIER v. THE JEFFERSONVILLE, MADISON AND INDIANAPOLIS
RAILROAD COMPANY.**

MASTER AND SERVANT.—*Liability of Employer for Injury of Employee by Co-Employee.*—Where laborers are engaged together at the same place in a work that requires co-operation, and for the furtherance of a common purpose, and so associated as to bring them in frequent contact with each other, they are co-laborers, and the employer can not be held liable for an injury to one employee by the negligence of a co-employee.

PLEADING.—*Action for Damages.—Contributory Negligence.*—In an action for damages the complaint must allege that the plaintiff is without fault, or an equivalent averment, or the complaint will be fatally defective.

From the Jackson Circuit Court.

R. M. Patrick and *B. E. Long*, for appellant.

S. Stansifer, for appellee.

McBRIDE, J.—The appellant was a stone mason, employed by the appellee. While assisting in the construction of a bridge for the appellee he was hurt.

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This suit was to recover damages for the injury thus sustained. The only questions we deem it necessary to consider are such as arise on the action of the circuit court in sustaining a demurrer to each paragraph of the complaint, on the ground that facts sufficient to constitute a cause of action were not stated. A preliminary question of practice is urged by the appellee which we do not consider, in view of the conclusion reached as to the sufficiency of the complaint.

The averments of the first paragraph show that the injury was caused by the carelessness and negligence of some carpenters, employed by the appellee to assist in the construction of the same bridge. It is averred that while they were working with a derrick, on the bridge, at a point some thirty feet above the appellant, they carelessly and negligently knocked a heavy timber off the bridge which fell upon and injured him. The theory of this paragraph seems to be, that because the appellant was employed as a stone mason, while the negligent employees were employed as bridge carpenters, each being subject to the immediate supervision and control of a different foreman, although all were employed at the same place, and in the common task of constructing a bridge, they were not co-employees. That each being engaged in carrying on a different and distinct part of the work, they belonged to different and distinct departments, and the rule as to fellow servants has no application.

The facts pleaded are not sufficient to require us to investigate or pass upon the soundness of the theory argued by counsel, for the reason that even in courts which fully recognize the doctrine that servants employed in different departments of a great enterprise are not fellow-servants, the appellant and the negligent bridge carpenters would be held to have held that relation to each other. It clearly appears from the complaint that they were engaged together, at the same place, in a work that required co-operation, and such association as would bring them in frequent contact

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with each other. *Chicago, etc., R. R. Co. v. O'Bryen*, 15 Ill. App. 134; *Chicago, etc., R. W. Co. v. Moranda*, 93 Ill. 302; *Chicago, etc., R. W. Co. v. Moranda*, 108 Ill. 576 (17 Am. & Eng. R. R. Cases, 564).

We consider it unnecessary to give any extended consideration to the question, for the reason that as the rule has long been declared in this State, it is clear that the parties were co-employees, and this paragraph contains no averments sufficient to show liability on the part of the appellee. *Gormley v. Ohio, etc., R. W. Co.*, 72 Ind. 31; *Brazil, etc., Coal Co. v. Cain*, 98 Ind. 282; *Indiana Car Co. v. Parker*, 100 Ind. 181, and many other cases.

The second paragraph may be disposed of with brief mention. Like the first, it is based on assumed negligence of the employer, the appellee. It, however, contains no averment that the appellant was himself without fault. Nor is there any equivalent averment. For this reason, if for no other, it must be held fatally defective.

The circuit court did not err in its rulings.

Judgment affirmed.

Filed May 24, 1892.

No. 16,515.

**THE FORT WAYNE LAND AND IMPROVEMENT COMPANY
ET AL. v. THE MAUMEE AVENUE GRAVEL ROAD
COMPANY.**

GRAVEL ROAD.—Including of Within Municipal Limits.—Exaction of Tolls.—How Affected.—The extension of the limits of a municipal corporation, so as to embrace a turnpike owned by a private corporation can not take from the corporation the right to exact tolls.

SAME.—Answer in Justification.—An answer in justification is bad which assumes that the defendants had a right to the road within the corporate limits, the answer alleging that "said road when said acts complained of were done, became a public street of said city," and admit-

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ting the destruction of a toll house and gate belonging to the turnpike company, but attempting to justify the act by alleging that they were worthless. If the toll house was the property of the turnpike company, the defendants had no right remove or confiscate it, even if it was valueless. An answer in justification must fully justify the wrongful acts charged in the complaint, or it will be insufficient.

From the Allen Superior Court.

W. J. Vesey and O. N. Heaton, for appellants.

R. C. Bell, S. R. Morris, J. Morris and J. M. Barrett, for appellee.

ELLIOTT, C. J.—The first question in this case may be thus stated: Does the extension of the limits of a municipal corporation, so as to embrace a turnpike owned by a private corporation, take from the corporation the right to exact tolls? In our opinion this question is free from difficulty. It was settled in the Dartmouth College case, that the charter of a private corporation invests it with contract rights which can not be divested or impaired, save by condemnation under the sovereign power of eminent domain. That power, as is well known, can not be exercised except in cases where private property is secured by due process of law, and upon the payment of just compensation. The property of a private corporation can no more be taken without due process of law, and upon just compensation, than can the property of a natural person. The franchise of exacting toll is property, and as such is within the protection of the paramount law. It is simply the application of a broad fundamental principle to a particular instance to adjudge that a turnpike company can not be deprived of its road or its franchises by an extension of the limits of a municipal corporation. The authorities are in substantial agreement upon this question. *People, ex rel., v. Detroit, etc., R. R. Co.*, 37 Mich. 195; *State v. Passaic T. P. Co.*, 27 N. J. L. 217; *Commonwealth v. Covington, etc., T. P. Co.* (Ky.), 5 S. W. R. 743. See also authorities cited in Elliott Roads and Streets, pp. 57,

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58. The decision in *Snell v. City of Chicago*, 133 Ill. 413, rests upon a statute, and is not relevant to the question here in dispute. We have no statute which subjects the property rights of a private corporation to the power of a municipal corporation, except in so far as such rights may be subordinate to the police power.

The sixth paragraph of the answer of the appellants is one of justification, and, as is well known, such an answer must fully justify the wrongful acts charged in the complaint or it will be insufficient. The answer before us does not justify the acts of the appellants in asserting, as the complaint alleges they do, the right to deprive the appellee of its property, but, on the contrary, assumes that they have a right to the road within the corporate limits, for it is alleged that "said road, when said acts complained of were done, became a public street of said city." The answer does not justify the claim of the appellants to the right to destroy the toll gate and take away the franchise of collecting toll, inasmuch as it admits the destruction of the toll house and gate, and attempts to justify the act by alleging that they were worthless. If the toll house was the property of the appellee, the appellants had no right to remove or confiscate it, even if it was valueless. The answer is bad.

The question of the power of the municipality to reduce the road to grade, and make it safe for use by the public, is not presented. The power to seize and appropriate the road is one thing and the power to make the highway safe and convenient for travel is quite a different thing. The infirmity in the answer is that it bases the justification upon a theory entirely too broad. It is probably true that as all property is held subject to the police power, a municipal corporation may reduce a turnpike to grade if the public safety or welfare so demands. See authorities cited. *Elliott Roads and Streets*, pp. 58, 59, 60.

Judgment affirmed.

Filed March 30, 1892; petition for a rehearing overruled June 7, 1892.

 Smith v. Downey et al.

No. 16,581.

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132	83
141	809

APPELLATE COURT.—Jurisdiction.—Action for Recovery of Specific Personal Property.—Equitable Defence.—The Appellate Court has jurisdiction where an appeal is taken in an action for the recovery of specific personal property, although intermediate between the filing of the complaint and the rendition of the judgment defences of an equitable nature may be interposed.

From the Marion Superior Court.

A. C. Harris, for appellant.

A. C. Ayres and A. Q. Jones, for appellees.

MILLER, J.—This is a motion to transfer this cause to the Appellate Court for final disposition.

The action was brought to recover the possession of a certificate of stock issued by the "Snow Storm Mining and Milling Company of Durango, Colorado."

The result of the litigation was the recovery by the appellees of the possession of the property in dispute.

The appellant was not, originally, a party to the action, but, upon her own petition, became a party defendant, and filed answers and a cross-complaint against the appellees, seeking to enforce a charge or lien upon the stock in controversy.

The action having been brought "for the recovery of specific personal property," the appeal is within the jurisdiction of the Appellate Court, unless it is taken out by the matters interposed by the appellant as a defence to the action.

Appeals in actions for the recovery of specific personal property being given, as a class, to the Appellate Court in broad and comprehensive terms, without the use of words of limitation such as are contained in the clause giving that court jurisdiction in actions "for the recovery of money only," carries to that court jurisdiction, although, intermediate between the filing of the complaint and the rendition of

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the judgment, defences of an equitable nature may be interposed. *Ex parte Sweeney*, 126 Ind. 583.

Ordinarily it is the nature of the action brought, not of the defence interposed, that gives character to a case and determines the class to which it belongs. When its character is once fixed, other matters go with it as incidents, so as to avoid the splitting of cases. *Elliott's Appellate Procedure*, section 48.

The statute does not withhold from the Appellate Court the determination of the rights of parties according to equitable principles, where the same is merely incidental to cases within its jurisdiction. *Parker v. Indianapolis Nat'l Bank*, 126 Ind. 595; *Baker v. Groves*, 126 Ind. 593.

We are of the opinion that the jurisdiction of this appeal is in the Appellate Court, and the clerk of this court is, therefore, ordered and directed to transfer this cause to that court for final determination.

Filed June 9, 1892.

No. 15,874.

ABERNATHY ET AL. v. ALLEN ET AL.

TRIAL BY JURY.—*Partition.*—*Joinder with Equitable Actions.*—Where a paragraph for partition is joined with paragraphs stating causes of action of exclusively equitable jurisdiction, prior to June 18th, 1852, the parties are entitled to have the issue of partition tried by a jury.

From the Boone Circuit Court.

T. J. Terhune and *B. S. Higgins*, for appellants.

C. S. Wesner and *O. D. Wesner*, for appellees.

McBRIDE, C. J.—The complaint in this case was in three paragraphs. The first paragraph was by heirs to set aside a

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voluntary conveyance made by a deceased ancestor upon the ground that it was procured by fraud and undue influence.

The second was to set aside a conveyance made by the ancestor on the ground that he was of unsound mind when he made it.

The third paragraph was for partition, and alleged that certain of the parties, plaintiff and defendant, were the owners in fee simple of certain land, describing it, and stating the specific interest alleged to belong to each. It alleged the indivisibility of the land, and asked that the parties be declared the owners of the same in the several shares indicated, and for partition. The complaint was in the usual form and its averments were specific. Issues were joined by answer of general denial.

The appellants, who were the plaintiffs below, demanded a trial by jury as to the issues joined on each paragraph. The court denied them a jury and the cause was tried by the court. The only question presented by the record arises on this action of the court, the question having been properly saved by exception and by bill of exceptions. The appellants insist they were entitled to a trial by jury of the issue joined on the third paragraph of the complaint, while the appellees argue earnestly that the action of the court was right. They apparently base this contention upon the ground that the court, in passing upon the demand for a jury to try that issue, was authorized to look to and consider the averments in each of the other paragraphs. Counsel say :

“The third paragraph, when taken as a part of the complaint or as a whole, proceeds upon the theory that the deed of conveyance named in the first and second paragraphs, executed by Simon Allen to defendants, is void or voidable. The three paragraphs might properly be united in one. It follows as a conclusion that if the plaintiffs fail on the first and second paragraphs, they can take nothing by the third. The complaint must be taken as a whole in this court.”

Section 278, R. S. 1881, authorizes a plaintiff to unite

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several causes of action in the same complaint in certain cases. The several causes of action, stated in the several paragraphs of the complaint at bar, all fall within the fifth clause of that section, and may properly be thus joined.

When the complaint contains more than one cause of action, each must be distinctly stated as a separate paragraph, and numbered. Section 338, R. S. 1881, clause 3.

Each paragraph must be sufficient in its own averments, and must in and of itself state a good cause of action.

It can not be aided by material averments contained in other paragraphs. Works Pr. & Pl., section 383, and authorities cited. While there is, in the case at bar, no question as to the sufficiency of any paragraph of the complaint, a consideration of the foregoing rule demonstrates the fallacy of the position taken by counsel for the appellees.

Each paragraph is, in effect, a separate complaint. We have, therefore, three separate complaints, which the statute says may be thus legitimately joined, and the questions raised by each and by all of them litigated together. It does not follow, however, that they may all be litigated in the same way.

Section 409, R. S. 1881, provides that in case of the joinder of causes of action which, prior to June 18, 1852, were of exclusive equitable jurisdiction with causes of action which, prior to that date, were designated as actions at law and triable by a jury, the former shall be triable by the court and the latter by a jury, unless waived. "The trial of both may be at the same time, or at different times, as the court may direct."

It is conceded that the issues joined on the first and second paragraphs of complaint were of exclusive equitable cognizance, and properly triable by the court. This court, in the case of *Kitts v. Willson*, 106 Ind. 147, held that in a suit for partition the parties were, under this statute, entitled to a jury trial. In the case of *Martin v. Martin*, 118 Ind. 227, the case of *Kitts v. Willson* was criticised, and modified,

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but not in such manner as to affect its authority on this point. In our opinion the parties were entitled to have that issue tried by a jury, and the court erred in refusing it.

Judgment reversed, with costs.

Filed June 7, 1892.

15,909.

WEIGOLD v. PROSS.

EJECTMENT.—Answer to Denial.—Proof of Defendant's Possession Dispensed

With.—In an action of ejectment, where the defendant appears and joins issue, under which he can make a defence, proof on the part of the plaintiff of defendant's possession is dispensed with by section 1056, R. S. 1881. The fact that he admits title in the plaintiff does not make such proof necessary, for he still has the right under his answer in denial to make any other defence he may have.

From the Tippecanoe Superior Court.

J. Park, for appellant.

T. H. Wreppers and *T. H. Adams*, for appellee.

OLDS, J.—This is an action of ejectment, and there was a finding and judgment for the plaintiff.

The only question presented relates to the sufficiency of the evidence. The appellant appeared and made a defence, and filed an answer in denial of the complaint. Upon the trial the appellant admitted that the appellee was the owner of the real estate, but there was no withdrawal of the answer.

When the defendant appears and joins issue under which he can make a defence, there is no necessity of the plaintiff making proof of defendant's possession. Such proof is expressly dispensed with by section 1056, R. S. 1881.

Under an answer in denial in an ejectment case, a defendant is permitted to give in evidence every defence to the action that he may have, either legal or equitable. And when

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the defendant appears and answers by denial, the evidence of his possession is dispensed with, and the fact that he admits title in the plaintiff does not make such proof necessary, for he still has the right to make any other defence he may have.

The joining of the issue fixes the proof necessary to be made by the plaintiff, and the fact that the defendant admits one fact which it is necessary for the plaintiff to prove, does not add to the facts necessary to be proven, any more than if the plaintiff had proven the fact independent of an admission.

The appellant in this case appeared and answered by denial, taking such steps as were necessary to give in evidence every defence he may have had.

He availed himself of the right to give in evidence all of his defences. Under this state of the issues, the appellee was not required to prove appellant in possession. By appearing and pleading to the action, the defendant admits his possession. *Holman v. Elliott*, 86 Ind. 231; *Carver v. Carver*, 97 Ind. 497.

There is no error in the record.

Judgment affirmed, with costs.

Filed May 24, 1892.

No. 15,806.

MOYER v. THE FORT WAYNE, CINCINNATI AND LOUISVILLE RAILROAD COMPANY.

CONTRACT.—Railroad.—Change of Ownership.—Foreclosure of Mortgage.—Non-Liability of New Company—Equitable Claim.—The plaintiff entered into a contract with two railroad companies to build a joint passenger station for them, each of the companies to pay a specified sum and he to pay a part of the cost himself, though there was nothing to show that he was to have any interest in the building when completed. One of the

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companies, which failed to pay as it had agreed to do, had a mortgage upon all of its property when the contract was entered into with the plaintiff. The mortgage was foreclosed. The bondholders became the purchasers at the foreclosure sale and reorganized the company.

Held, that the new company, although it used the station, was not liable to the plaintiff.

Held, also, that an agreement between the bondholders that a certain sum should be retained for the payment of a specified claim and other small claims, as might be required, the claim of the plaintiff not being specially designated, created no obligation in his favor.

Held, also, that even if an obligation was created in favor of the plaintiff, he would have no right to recover upon it, as it does not appear that the sum was not properly used to pay the claim specified or other claims having rightful precedence of the plaintiff's claim.

PLEADING. — *Complaint* — *Specific Averments Control.* — *Corporation.* —

Where a complaint charged that the defendant is the same corporation under a different name as the one that entered into a contract with the plaintiff, but the specific averments of the complaint showed that the defendant was a new corporation, the latter averments must control, and there can be no recovery upon the theory that the defendant corporation is the same as the one with which the plaintiff contracted.

From the Wayne Circuit Court.

U. D. Cole, H. C. Fox and J. T. Robbins, for appellant.

W. E. Hackedorn, J. H. Mellett, R. E. Bell and S. R. Morris, for appellee.

ELLIOTT, J.—The appellant alleges in his complaint that the appellee is a railway corporation organized under the laws of this State; that it is the same corporation under a different name, and holding the same property as the Fort Wayne, Muncie and Cincinnati Railroad Company; that the company last named executed a mortgage on the 9th day of June, 1889, to Alfred P. Edgerton and Jesse L. Williams, trustees, to secure the payment of one million eight hundred thousand dollars, covering all the property of the company; that this mortgage was subsequently foreclosed and a sale of the property made upon the decree; that the purchasers of the property were bondholders and re-organized the company; that prior to the re-organization of the company by the purchasers at the foreclosure sale, the appellant entered into a

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contract with the Fort Wayne, Muncie and Cincinnati Railroad Company, and the Cincinnati, Hamilton and Indianapolis Railroad Company for the construction of a joint passenger station at the junction of the two roads at Connersville; that by the terms of the agreement the appellant was to receive from each of the companies seven hundred and fifty dollars, and was himself to pay one thousand dollars toward the construction of the station; that he performed his part of the agreement and erected the building as provided by the contract; that the building was accepted by the companies and they entered into possession of it on the first day of September, 1874; that neither the appellee nor its predecessor has paid the sum agreed upon, nor any part thereof. It is alleged, in general terms, that the sum of one hundred and fifty thousand dollars was set aside to pay sundry claims, and that the claim of the appellant was among those so provided for, but there is no allegation, directly or indirectly, showing by whom the sum named was set apart. The written contract, made part of the complaint, was executed between the persons holding the bonds which the mortgage was executed to secure, and it provides that the sum named "shall be retained by the company, which may be used by the board of directors in settlement of the claim of the Liverpool and London and Globe Insurance Company, and for other small claims so far as may be required."

It is a familiar rule of pleading that specific averments control general ones. *Reynolds v. Copeland*, 71 Ind. 422. See cases cited Elliott's App. Prac., section 656, p. 588, note 1. The general averment that the appellee is the same corporation as the one that entered into the contract with the appellant, gives way to the specific averments which show that the appellee is a new corporation organized by the purchasers at the foreclosure sale. There can, therefore, be no recovery upon the theory that the corporation here sued is the same as the one with which the appellant contracted.

The provision in the contract between the bondholders

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which we have quoted does not bind the appellee to pay the appellant any sum whatever. It simply authorizes the directors to use that sum as they may deem necessary in payment of claims. But if it were conceded that the provision does create an obligation in favor of the appellant, still there is no right to recover upon it, because it does not appear that the sum was not properly used to pay the claim specified, or other claims having rightful precedence of the appellant's claim.

We understand counsel, however, to place their right to a recovery mainly upon the ground that the facts show an equitable claim. Their contention is that as the new company used the building erected by their client, it must pay the debt of its predecessor. This contention can not prevail. The old company was the debtor of the appellant, but the new did not become liable for that debt. A corporation formed by bondholders who purchase at a sale upon a decree foreclosing the mortgage securing their bonds does not become liable for the debts of the mortgagor.

It is assumed by counsel that the appellee is liable in equity because it took possession of the appellant's property. But this assumption is one that can not be supported. There is nothing in the complaint showing that the appellant owned the station; on the contrary, the facts stated show simply that the corporation with whom the appellant contracted, promised to pay him a designated sum of money, and for that sum became his debtor. The cases of *Lake Erie, etc., R. W. Co. v. Griffin*, 107 Ind. 464, *Bloomfield R. R. Co. v. Grace*, 112 Ind. 128, and cases of like character are not in point, for in those cases possession of the complainant's property was taken and held by the railroad company. This case is in no respect different from that wherein one man agrees to build a house for another for which that other promises to pay a given sum, and a third person becomes the owner of the house by purchase at a sale made upon a decree foreclosing a prior mortgage. In the

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case supposed, we think it beyond controversy that the purchaser could not be held for the debt of the mortgagor to the builder of the house, and the principle which rules the supposed case must determine the actual one.

As the appellant has no cause of action, the judgment must be affirmed upon the assignment of cross-errors. See authorities cited. Elliott App. Proc, sections 417, 418.

Judgment affirmed.

Filed June 15, 1892.

No. 15,890.

CALDWELL v. THE SCHOOL CITY OF HUNTINGTON ET AL.

STATUTE OF FRAUDS.—*Contract to be Performed within a Year.*—*School Superintendent.*—*Parol Contract.*—*Failure to Reduce to Writing.*—A board of school trustees, on the 24th day of May, 1887, by a resolution passed at a regular meeting, employed the plaintiff as superintendent of the public schools of the city from the 1st day of August, 1887, to the 31st day of July, 1888. He was notified of his election and accepted said employment, but the secretary of said board failed to make any record thereof. Afterward a new board repudiated the contract, and employed another superintendent. The plaintiff offered to perform the contract on his part, but was not permitted to do so, and suit was brought to recover the year's salary as fixed by the resolution.

Held, that the contract was within the statute of frauds, and that a simple failure or refusal to put the parol contract in writing did not create an exception to the statute.

Held, also, that the charge that the secretary "wilfully and purposely failed and refused as such secretary to make the record," is not equivalent to charging that the secretary fraudulently prevented the contract from being reduced to writing and signed by the party to be charged, and does not take the case out of the statute of frauds.

From the Allen Circuit Court.

C. W. Watkins, for appellant.

H. B. Saylor, S. M. Saylor and J. M. Saylor, for appellee.

MILLER, J.—The complaint alleges that the school board

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of the school city of Huntington, on the 24th day of May, 1887, by a resolution passed at a regular meeting, employed the appellant as superintendent of the public schools of the city from the 1st day of August, 1887, to the 31st day of July, 1888; that he was notified of his election, and accepted such employment; that the secretary of the board wilfully and purposely failed and refused, as such secretary, to make the record of the employment; that the minutes of the meeting contained a resolution, but that the same is in the possession of the defendants, or has by them been destroyed or mislaid, so that a copy can not be filed with the complaint; that afterwards a new board of trustees repudiated the contract, and employed another superintendent.

The complaint shows that the appellant, at the commencement of the school year, offered to perform the contract on his part, but was not permitted to do so.

This action was brought to recover the year's salary, as fixed by the resolution of the board of school trustees.

A demurrer was sustained to the complaint, and this ruling presents the only question in the record.

The statute provides that no action shall be brought "Upon any agreement that is not to be performed within one year from the making thereof, unless the promise, contract, or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." Section 4904, R. S. 1881.

This contract, if such it was, having been entered into on the 24th day of May, for services to commence on the 1st day of August following, and continue for the period of one year, was within the statute, unless the resolution passed was a written contract or memorandum, or note thereof signed by the party to be charged, or unless the failure to record the resolution and proceedings of the board was such as to take the contract out of its operation.

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It seems too clear for argument, that no contract or memorandum was *signed* by the party to be charged. The remaining question is, did the failure to enter the resolution and proceedings make an exception to the statute of frauds?

That a simple failure or refusal to put a parol contract in writing will not create an exception to the statute of frauds, was held in the well considered case of *Caylor v. Roe*, 99 Ind. 1. In that case, speaking of a summary of the case of *Glass v. Hulbert*, 102 Mass. 24, the following language pertinent to the case before us was quoted: "That it makes no difference whether the want of a writing was accidental or intentional, and that so long as the effect of the fraud or mistake extends no further than to prevent the execution, or withhold from the other party written evidence of the agreement, it does not furnish ground for the court to disregard the statute, and enter into the investigation of the oral agreement for the purpose of enforcing it."

In the complaint in this case the charge is made that the secretary "wilfully and purposely failed and refused, as such secretary, to make the record." This is far short of charging that the defendant fraudulently prevented the contract from being reduced to writing and signed by the party to be charged. It is, indeed, a question if the statute does not require that all contracts for the employment of teachers shall be in writing. *Fairplay School Tp. v. O'Neal*, 127 Ind. 95.

The court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

Filed June 14, 1892.

Perkins et al. v. Hayward et al.

No. 16,302.

PERKINS ET AL. v. HAYWARD ET AL.

DRAINAGE.—*Judgment Establishing Ditch.—Correction of.*—The drainage law contemplates that after judgment has been rendered by the court, establishing a ditch, and ordering its construction, the case shall remain upon the docket of the court while the ditch is in progress of construction. It is on the docket, however, only for the purpose of carrying into effect the judgment actually entered, and not for any action modifying or changing that judgment.

SAME.—*Correction of Judgment After Term.—Notice.—Waiver of.*—After the expiration of the term at which judgment has been rendered by the court establishing a ditch, no order can be made modifying or correcting the judgment, except upon notice again bringing the parties before it, or upon their voluntary appearance, and a waiver of notice by them.

SAME.—*What Constitutes Waiver of Notice.*—Where, however, the court had rendered judgment against the remonstrators, establishing the ditch, and the clerk had taxed the costs of the proceedings against them, but no judgment for costs had been so entered up, and a motion was filed for a *nunc pro tunc* entry, to that effect, and the remonstrators, after entering a special appearance expressly challenging the jurisdiction of the court over their persons, and before any ruling was made on that question, filed a counter-motion on the subject of costs, they thereby waived want of notice, and the action was equivalent to a full and voluntary appearance to appellee's motion.

SAME.—*Judgment for Costs Against Remonstrators.—Nunc pro Tunc Entry.*—A finding and judgment against remonstrators, establishing a ditch, properly and necessarily involves a judgment for costs. See section 590, R. S. 1881. The failure of the clerk to enter, as a part of the judgment, a judgment for costs, was a mere omission to record a part of the judgment actually rendered, as shown by the record, and the omission could be supplied by a *nunc pro tunc* entry.

SAME.—*Judgment Establishing Ditch.—Collateral Attack.*—The circuit court having jurisdiction over the subject-matter of the construction of public drains, the judgment of a circuit court establishing a particular drain, can not be attacked collaterally, on the ground that said drain, if constructed, will have an effect not contemplated by the Legislature in the enactment of the drainage law.

JURISDICTION.—*Collateral Attack.—When Must be Made.—Direct Attack.—When too Late.*—Where the court has jurisdiction of the subject-matter, and objection is made to its jurisdiction over a particular case, the objection must be promptly made, and comes too late after the parties pursue the case to final judgment in the court of last resort without

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159	21
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160	15
160	537
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164	664
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raising the jurisdictional question, and raise it for the first time when the judgment of affirmance by the Supreme Court is spread on the records of the circuit court. After such a delay, the question of jurisdiction could not be raised, even in a direct attack on the judgment.

JUDGMENT.—*Nunc pro Tunc Entry.—When May be Made.*—A *nunc pro tunc* entry may be made if there is any entry or memorandum found among the records of the case, required by law to be kept, showing action taken, or orders made by the court, which the clerk has failed to record.

From the La Grange Circuit Court.

R. Lowrey and J. W. Hanan, for appellants.

J. Morris, R. C. Bell, J. M. Barrett, S. R. Morris, J. S. Drake and F. D. Merritt, for appellees.

MCBRIDE, C. J.—April 8th, 1884, the appellees commenced a proceeding in the La Grange Circuit Court to establish a ditch, pursuant to the provisions of the act of April 8th, 1881, as amended March 8th, 1883. R. S. 1881, sections 4273 *et seq.*; Acts 1883, pp. 173 *et seq.*; Elliott's Supp., sections 1175 *et seq.*

The appellants appeared and remonstrated.

It is unnecessary to trace the steps in the proceeding further than to say that at the November, 1885, term of that court, it culminated in a trial and a judgment of the La Grange Circuit Court establishing the ditch. On appeal to this court that judgment was affirmed. *Perkins v. Hayward*, 124 Ind. 445. The judgment of affirmance was rendered June 21st, 1890.

The record before us shows that on the 8th day of September, 1890, the appellees filed in the La Grange Circuit Court a motion, showing that, while the court had found for the petitioners, and against the remonstrants, and had rendered a judgment accordingly establishing the ditch, and the clerk had taxed the costs of the proceeding against the remonstrants, no judgment had been entered for costs. This, the motion assumed and alleged, was solely because of the misprision of the clerk, it being apparently assumed that the judgment establishing the ditch carried with it a judgment

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for cost which should, and, but for the inadvertence, omission and mistake of the clerk, would have been entered of record at the same time, and as a part of the judgment establishing the ditch. They thereupon asked for a *nunc pro tunc* entry of such judgment.

The record further shows that, on the 19th day of November, 1890, which was the third judicial day of the November term of the La Grange Circuit Court, the attention of the court was called to the foregoing motion by the attorneys for the appellees, who, in open court, moved for a *nunc pro tunc* entry in accordance with their written motion.

To this the appellants, by counsel, on the same day, entered a special appearance and moved the court to dismiss or reject the motion, for the reason that they had no notice of it, and that there was nothing of record by which to make the amendment in the judgment asked for by the appellees. The record further shows that one week later, on November 26th, 1890, the appellants filed in open court a written motion, of which the following is a copy, omitting the title:

" 1st. The defendants move the court to render judgment in the above entitled cause in favor of the defendants, against the petitioners for the costs and charges accrued in said cause, as being laid out and expended by the defendants herein, on the ground, and for the reason, that it appears by the petition and record herein that the court has no jurisdiction of this proceeding, and that the character of the drain sought to be constructed is shown by the petition not to be one which is authorized by the statute of the State of Indiana, or other law of the State, and that the judgment for costs be thus modified.

" 2d. The defendants further move the court separately and additionally, to set aside, vacate and annul the judgment heretofore rendered herein, on the twenty-second judicial day of the November, 1885, term of said court, establishing the drain prayed for in the petition herein, and approving the

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assessments made by the commissioners, and appointing John Price drainage commissioner to construct said work, for the reason that it appears by the petition, that it is proposed herein to construct a drain to lower and drain certain of the fresh water lakes of the counties of Steuben and La Grange ; that such is one of the objects and purposes, and that this court has no jurisdiction thereof, nor any authority of law to proceed further therein.

“ LOWREY & HANAN,
“ *Attorneys for Defendants.*”

The record shows that the appellants thereupon moved the court to “ render judgment in favor of the defendants in this cause, and to annul the judgment heretofore rendered on the 22d day of November, 1885, for the reason that said drainage will lower and drain certain fresh water lakes in La Grange and Steuben counties.”

On the 11th day of December, 1890, and while both of the foregoing motions were pending and not acted upon, the following record entry was made in the case :

“ Be it remembered, that in vacation, before the September term, 1890, of the La Grange Circuit Court, to wit : August 22, 1890, there was filed in the clerk’s office of the La Grange Circuit Court a certified copy of the opinion and judgment of the Supreme Court of the State of Indiana in the above entitled cause.

“ And be it further remembered that, afterwards, to wit : December 11, 1890, that being the 22d judicial day of the November, 1890, term of said court, on motion of James S. Drake, one of the counsel for petitioners in said cause, it was ordered by the court that said opinion be spread of record upon the order book of said court, which opinion is in words and figures following, to wit :”

The opinion was therefore spread upon the order book.

The court then took up the two pending motions, and disposed of them in inverse order. The motion of the appellants, although the last filed, was ruled upon first. It was

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overruled and the appellants excepted. The appellees' motion was sustained, and a *nunc pro tunc* entry was made of a judgment for costs in favor of the appellees and against the appellants.

The appellants contend that in both rulings the circuit court erred.

Their contention is placed by them upon three grounds:

1st. That, as no notice was given them of the motion for the *nunc pro tunc* entry, and their appearance thereto was special, the court acquired no jurisdiction of their persons, and was therefore without authority to make an order binding upon them.

2d. The record did not show any minute or memorandum made by the judge at the November term, 1885, directing a judgment for costs, and there was, therefore, nothing upon which to base the *nunc pro tunc* entry.

3d. The averments of the petition showed that the effect, if not the purpose, of the proposed ditch was to lower the water in certain fresh water lakes, and for that reason the court had no jurisdiction of the subject matter (citing *Baltimore, etc., R. R. Co. v. Ketring*, 122 Ind. 5), and, therefore, that the judgment establishing the ditch was void, and could be disregarded or set aside by the court on motion.

We will consider the questions in the order stated.

The drainage law, under which these proceedings were had, contemplates that after judgment has been rendered by the court establishing a ditch and ordering its construction, the case shall still remain upon the docket of the court while the ditch is in progress of construction. The ditch commissioner, to whose supervision the work is entrusted, acts throughout under the direction of the court. Section 4279, R. S. 1881.

Only when he reports, showing the work done, does it finally disappear from the docket.

It does not follow, however, that the entire proceeding is *in fieri* during all this time. The statute contemplates

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adversary proceedings. Provision is made for bringing before the court all persons interested in or affected by the work. Issues may be formed and tried, as was done in this case. But the judgment, establishing the ditch and ordering its construction, is a final judgment, which terminates the adversary proceedings.

It is, thereafter, on the docket only for the purpose of carrying into effect the judgment actually rendered, and not for any action modifying or changing that judgment. So far, therefore, as the adversary proceedings are concerned, it is no longer *in fieri*, after the expiration of the term when the judgment was rendered. After that time the court can make no order changing, modifying or correcting the judgment, except upon notice, again bringing the parties before it, or upon their voluntary appearance.

In our opinion the court in this case had no jurisdiction to act upon the motion for a *nunc pro tunc* correction of the judgment without notice, or the voluntary appearance of the appellants and a waiver of notice by them.

Their appearance of November 19th, 1890, being a special appearance, expressly challenging the jurisdiction of the court over their persons, did not waive notice. They had the right to appear specially for that purpose, and if nothing had thereafter been done by them to waive notice it is clear that the court would have been without authority to make the order.

The action of the appellants, however, on the 26th day of November, 1890, was, in our opinion, a complete waiver of the objection of want of notice, and was equivalent to a full and voluntary appearance. At that time the appellee's motion was still pending, with no ruling made on the question raised by the appellants on their special appearance.

Without insisting on a ruling on these questions, they, themselves, voluntarily appeared and filed a counter motion. If they desired to save the question they might have done so by requiring a ruling upon their special appearance, and by

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an exception before filing their counter motion. Their motion, however, went to the merits of the entire proceeding. Made as it was, before a ruling had been made on the questions raised by their special appearance, and even ruled upon before the other questions were decided, it is, we think, clear, according to the great weight of authority, that it was a complete waiver of notice. Elliott's App. Proc., section 637, and cases cited; *Elliott v. Lawhead*, 43 Ohio St. 171; *Handy v. Ins. Co.*, 37 Ohio St. 366; *Maholm v. Marshall*, 29 Ohio St. 611; *Sealey v. California Lumber Co.*, 24 Pac. Rep. (Ore.), 197; *Colorado Cent. R. R. Co. v. Caldwell*, 19 Pac. Rep. (Col.) 542; *Layne v. Ohio River R. R. Co.*, 35 W. Va. 438.

A *nunc pro tunc* entry, in practice, is an entry made now of something which was actually previously done, to have effect as of the former date. Its office is not to supply omitted action by the court, but to supply an omission in the record of action really had, but omitted through inadvertence or mistake. 12 Am. & Eng. Encyc. of Law, p. 80 *et seq.*, and authorities cited; *Chissom v. Barbour*, 100 Ind. 1.

It is not necessary for us here to lay down any general rule as to the evidence necessary to authorize an entry *nunc pro tunc*, further than to say that such action may be had if there is any entry or memorandum found among the records of the case, required by law to be kept, showing action taken, or orders made by the court which the clerk has failed to record. 12 Am. & Eng. Encyc. of Law, 81.

The statute under which this proceeding was had provides that: "When the finding of the court is against the remonstrance for any cause, * * * he shall pay the costs occasioned by the remonstrance." Counsel for the appellants contend, however, that this, while it imposes upon the defeated remonstrant the duty of *paying* the costs, does not authorize a judgment against him for them. In this we can not agree with them. In our opinion a fair construction of

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the statute makes the duty of the court imperative in such cases to render a judgment, in favor of the petitioners for such costs. This is the rule in ordinary civil causes. Section 590, R. S. 1881; *Merrill v. Shirk*, 128 Ind. 503. We think it was the intention of the Legislature, by the statute above quoted, to apply the same rule to proceedings of this character. A finding and judgment against remonstrators, establishing a ditch, therefore, properly and necessarily involves a judgment for costs. In the case at bar the court did, as shown by the record, find against the remonstrants, and did render final judgment against them establishing the ditch. The failure of the clerk to enter, as a part of the judgment, a judgment for costs was a mere omission to record a part of the judgment actually rendered as shown by the record.

This brings us to the consideration of the final proposition. In the original proceeding, the question of jurisdiction was not raised, either in the circuit court or in this court.

As the question comes to us, it presents some novel features. It is an attack on a judgment of a court of general jurisdiction which has been appealed to and affirmed by the court of last resort. The attack is by a party to the record, the party who appealed the cause and unsuccessfully sought its reversal. His motion asked the court, notwithstanding the affirmance of the judgment, to treat it as a nullity.

The attack upon the judgment is collateral, and can only succeed if the judgment is void.

It must fail if it is merely erroneous, no matter how great the error.

That the attack is collateral does not seem to be controverted by counsel in their argument, nor, in our opinion, could that fact be successfully questioned. The contention, earnestly presented and ably and vigorously argued, is that the averments of the petition, showing that the effect of the construction of the ditch would be to lower certain lakes in

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La Grange and Steuben counties, the proceeding was "without authority, and incurably void," because the court had no jurisdiction of the subject-matter. If counsel are right in their contention, that the court had no jurisdiction of the subject-matter, their argument is unanswerable, and the judgment is void. They, however, err in giving to the term "subject-matter" too limited an application.

Their error lies in the failure to distinguish between the subject-matter of the proceeding and the subject-matter of the specific case then before the court.

Jurisdiction of the subject-matter of a case grows out of the fact that it belongs to a general class of cases of which the court has jurisdiction.

If the court has no jurisdiction of the subject-matter, it has no power to act at all, and any order made by it is void, and may be ignored. The parties can not waive the objection, nor can they by agreement give to the court jurisdiction of a case belonging to a class which the law withholds from its cognizance. The question may be raised at any time, and the court's action in usurping jurisdiction may be questioned collaterally.

If, however, the court has jurisdiction of the subject-matter of an action, the fact that the averments of the complaint or petition in the case before it are defective, or insufficient, or that it contains averments tending to deprive the court of jurisdiction to grant the specific relief sought, will not, of itself, render the judgment of the court void. When a case is commenced in a court having general jurisdiction of the class of actions to which it belongs, the court has jurisdiction of the subject-matter. And, if it also acquires jurisdiction of the parties litigant, its judgment therein is not open to collateral attack, however erroneous it may be. Having jurisdiction of the class of cases, it is, of necessity, clothed with power to decide upon the sufficiency of the jurisdictional averments in the specific case presented. The power to decide involves the power to decide wrong as well as right.

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Having the power to decide the question, an erroneous decision does not oust its jurisdiction. The right and the power to decide protect its decisions from collateral attack whether they are right or wrong. The following, with many other authorities, will be found to fully sustain the foregoing propositions. Elliott's Appellate Procedure, sections 501, 502 and 503; *Jackson v. Smith*, 120 Ind. 520; *State, ex rel., v. Wolever*, 127 Ind. 306; *Chicago, etc., R. W. Co. v. Sutton*, 130 Ind. 405; *Alexander v. Gill*, 130 Ind. 485; *McCoy v. Able*, 131 Ind. 417.

The subject-matter of this proceeding was the construction of a public drain. Of this class of cases the circuit court has jurisdiction.

The objection raised is that the specific drain sought to be constructed will have an effect not contemplated by the Legislature in the enactment of the drainage law. It is plain that the question of jurisdiction goes to the particular case, and is within the rules above stated. The objection is not that the circuit court of La Grange county has not jurisdiction to direct the construction of a public drain, but that it had no authority to direct the construction of this particular drain. In other words, that while its power to direct the construction of public drains is clear, if a sufficient petition is filed, and the proper preliminary steps have been taken, it erred in the case at bar in holding the petition sufficient, and proceeding on that assumption.

While, as we have said, the question of jurisdiction was not raised, either in the circuit court or in the Superior court, the circuit court inferentially affirmed its jurisdiction by taking cognizance of the case and deciding it. If it erred by so doing, the appellants could only avail themselves of the error by a direct attack. In like manner this court, by taking cognizance of the appeal and affirming the judgment, inferentially affirmed that the case made by the petition was within the jurisdiction of the circuit court.

We find no error in the record.

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The judgment might well be affirmed, also, upon other grounds than that the attack upon the judgment is collateral.

In our opinion there was a complete waiver of the question by the appellants, by their failure to raise it at the proper time.

The rule in such cases is thus stated in *McCoy v. Able, supra*: "There was here jurisdiction of the general subject—that is, of the general class, and, when such jurisdiction exists, specific objection to the jurisdiction must be opportunely made and duly brought into the record."

See also Elliott's Appellate Procedure, section 776.

Objections to the jurisdiction, when objections are necessary to save the question, must be promptly made, or they will be lost by waiver. It must be understood, of course, that we are still speaking of a case where the objection goes to the jurisdiction of the court over the particular case, and not to its jurisdiction over the class of cases to which that case belongs.

The conduct of the parties in pursuing the case to final judgment in the court of last resort, without even a suggestion of the jurisdictional question, and raising it for the first time when the judgment of affirmance by the Supreme Court is spread on the records of the circuit court, is, in our opinion, an entire waiver of the error, if there was any. So that the appellants are not in situation to raise the question, even in a direct attack on the judgment.

Judgment affirmed with costs.

Filed June 16, 1892.

 Brown et al. v. Trexler et al.

No. 15,381.

BROWN ET AL. v. TREXLER ET AL.

ASSIGNMENT OF ERRORS.—*Names of Parties.*—*Omission of.*—An assignment of errors is defective in which neither the names of all the appellants, nor the christian name of one of the appellees appear either in the title or the body of the assignment of errors.

APPEAL.—*Dismissal of.*—*Assignment of Errors.*—*Failure to Name Parties.*—*Notice to Co-Parties.*—A failure to name all the parties in an assignment of errors, or a failure to give notice to co-parties, against whom judgment was rendered in the court below, is a ground for the dismissal of the appeal.

SAME.—*Objection to Assignment of Errors.*—*Waiver of.*—*Submission of Cause.*—*What Does not Constitute.*—An agreement on the part of appellees to allow counsel for appellant an extension of time for filing his brief, with a request that, when the briefs were filed, the case should be passed upon in the regular way, and afterwards a second agreement for an extension, in which the right to make any legal objection to the record and assignment of errors was reserved, did not constitute a waiver of any objection to the assignment of errors, or a submission of the cause by agreement.

From the Noble Circuit Court.

R. Lowry, J. E. McCloskey, J. D. Terrall and J. W. Hannan, for appellants.

O. L. Ballou, J. S. Drake and F. D. Merritt, for appellees.

OLDS, J.—This action originated before the board of commissioners of La Grange county, on a petition by the appellees to vacate a highway.

The appellant, Jacob S. Brown, and a number of others, filed a remonstrance. An appeal was taken to the La Grange Circuit Court. The venue was then changed to the Elkhart Circuit Court, and then to the Noble Circuit Court, where the case was finally disposed of by a dismissal, and an appeal prosecuted to this court.

In taking up the case for consideration and decision, we are met at the threshold, by counsel for the appellees, with an objection to the consideration of the questions discussed by counsel for appellant in their brief, for the reason that there

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is no sufficient assignment of error, and a dismissal of the appeal is asked.

In the assignment of error the cause is entitled, "Jacob S. Brown, Robert McCloskey and others, appellants, v. Reuben Trexler, Luke Silby, H. Omstead and John Senburn, appellees." Neither the names of all of the appellants nor the christian name of appellee Omstead appear either in the title or the body of the assignment of error. That this assignment of error is defective, is so well settled as to scarcely need the citation of authority. See *Thoma v. State*, 86 Ind. 182, and authorities there collected; *Snyder v. State, ex rel.*, 124 Ind. 335; *Arbuckle v. Swim*, 123 Ind. 208.

The assignment of error is insufficient.

Judgment affirmed.

Filed Feb. 25, 1892.

ON PETITION FOR A REHEARING.

OLDS, J.—The appellants in this case were defendants in the court below, being remonstrators against the vacation of the highway. It appears from the record that a large number of other persons joined with Jacob S. Brown and Robert McCloskey in remonstrating against the vacation of the highway. The appeal from the board of commissioners was dismissed, and final judgment rendered against all of the defendants, and all of the defendants prayed an appeal to this court.

The wording is a little peculiar. It is that all of the defendants, and said defendants, Jacob S. Brown and Robert McCloskey, separately and severally pray an appeal. There is a bill of exceptions in the record which shows exceptions by all of defendants. Brown and McCloskey's names appear the same as in the prayer for an appeal.

As the record stands it shows a final judgment rendered in the circuit court against appellants, Brown and McCloskey, and a number of others. An appeal is taken to this court, and there is a failure to name the other parties against

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whom, together with Brown and McCloskey, a joint judgment is rendered, and no notice is served upon them, nor is there any refusal to join in the appeal. The transcript was filed in this court on February 7th, 1890.

There is no proper assignment of error, if all of the parties have joined in the appeal; and if they have not joined in the appeal, and Brown and McCloskey alone appeal, then these two parties named have not perfected their appeal by proper notice to their co-defendants in the court below. In either event the case is not properly in this court.

From the assignment of errors, it appears that some parties, in addition to Brown and McCloskey, appeal, but if so, who are they? Without an assignment of errors stating the names of the parties appealing, it is impossible to tell who in fact does appeal.

The assignment of error takes the place of a complaint in this court, and it must show who are parties. It is suggested that the words "and others" in the title of the cause in the assignment of errors should be treated as surplusage, but, as we have said, that places the parties named in no better shape, for they have given no notice as required by section 635, when only a part of several co-parties appeal.

It is contended that the appellees waived any objection to the assignment of error by entering into an agreement to allow counsel for appellants an extension of time for filing their brief. We do not think there was any waiver by this agreement. The time of filing their brief was twice extended. The first contained a statement in the shape of a request that when the briefs were filed the cause should be passed upon in the regular way. Afterwards, there was a second agreement for an extension filed, in which the right to make any legal objections to the record and assignment of errors was reserved.

We are cited by counsel to authorities holding, in effect, that the submission of a cause by an agreement, or joining issues on the merits of the case, is a waiver of the

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right to dismiss the cause on account of a failure to give notice to co-parties against whom judgment was rendered below, or on account of a defective assignment of errors, but the trouble is they are not applicable to the facts in this case. This cause was not submitted by agreement, and the first step taken by the appellees in the case was to file their brief, in which the first point they make, and the first question they discuss, is the sufficiency of the assignment of errors, and they insist that the appeal should be dismissed. They follow with a discussion of the questions presented by the appellants, but they do so upon the theory that the court may pass upon their motion to dismiss adversely to them.

It has been uniformly held by this court that a failure to name the parties in an assignment of errors, or a failure to give notice to co-parties, against whom judgment was rendered in the court below, is a ground for dismissal. *Koons v. Mellett*, 121 Ind. 585, and authorities thus cited. *Hunderlock v. The Dundee, etc., Co.*, 88 Ind. 139; *Cranmore v. Bodine*, 65 Ind. 25; *Reeder v. Maranda*, 55 Ind. 239; *Aylesworth v. Milford*, 38 Ind. 226; Elliott's App. Proc., section 426. Forced submission under the law does not waive any rights the parties would otherwise have. *Heller v. Clark*, 103 Ind. 591.

It has also been uniformly held that the assignment of errors must contain the names of all the parties, and must be made within one year from the date of the rendition of the judgment. *Lawrence v. Wood*, 122 Ind. 452; *Snyder v. State, ex rel.*, 124 Ind. 335; *Braden v. Leibenguth*, 126 Ind. 336; *Bacon v. Withrow*, 110 Ind. 94; Elliott's App. Proc., section 322.

The mandate should have been that the appeal be dismissed, instead of an affirmance of the judgment, and it is modified to that effect. The petition for a rehearing is overruled, and the mandate affirming the judgment is set aside, and the appeal is dismissed.

Filed June 17, 1892.

No. 15,476.

O'NEAL v. THE CHICAGO AND INDIANA COAL RAILWAY COMPANY.

SPECIAL VERDICT.—*Defects in Can Not be Supplied by Intendment.*—In an action where the jury returned a special verdict, and the defendant moved for a judgment in his favor on the finding, and the motion was sustained and judgment rendered accordingly, the plaintiff on appeal must fail, unless the facts set out in the special verdict support the material allegations of the complaint. Defects in special verdicts can not be supplied by intendment.

RAILROAD.—*Risks Assumed by Employees.*—*Contributory Negligence.*—*Duty of Employer.*—When a person enters into the employment of a railroad company, the employer is under no obligation to examine the employee as to his experience or fitness, unless said applicant be a child, and said employee assumes the risk of such perils as are incident to the same, and must exercise care proportionate to the danger of the service. The employee will be held to have knowledge of what is open and obvious, and to recover damages for an injury sustained he must be free from contributory negligence.

MASTER AND SERVANT.—*Duty of Employer.*—It is the duty of an employer to provide a safe working place and appliances for his employee, but he is not an insurer.

From the Clay Circuit Court.

M. A. Moon, G. C. Moon and J. F. McNutt, for appellant.

S. H. Spooner, W. L. Layford and G. A. Knight for appellee.

ELLIOTT, J.—The appellee moved for and was awarded a judgment upon the special verdict, and the question for decision is, whether the court did right in sustaining the motion. This question must be decided upon the facts stated in the verdict, excluding mere matters of evidence and conclusions. It is also to be borne in mind that, as the appellant had the burden of proof, the facts stated in the verdict must show a cause of action or this appeal can not be sustained, for it is well settled that defects in special verdicts can not be supplied by intendment, and that a party who has

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144 608
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the burden can not succeed where the facts found do not support all the material averments of his complaint. See authorities cited in Elliott's App. Proc., section 753, notes 1, 2 and 3.

The material facts contained in the special verdict may be thus summarized: The appellant sought and obtained employment in the service of the appellee as a brakeman on one of its trains. At the time of entering the appellee's service he was twenty years and four months of age. He made no representation as to his age, and the appellee made no inquiry as to his age or experience, but was informed by the appellant that "he could set brakes and knew the signals." The appellee "had no knowledge whatever of the plaintiff's inexperience or incapacity to understand the duties of a brakeman at the time he was employed as such. The plaintiff told the defendant's yardmaster, Wright, by whom he was employed, that he understood the signals and knew how to set brakes." The plaintiff, "in so far as the agents or employees of the defendant could observe, appeared to be skillful and to understand and discharge his duties as such brakeman." On the 27th day of September, 1887, the train on which the appellant was engaged in performing the duties of a brakeman, was going north in charge of a competent and experienced conductor, engineer, fireman and brakeman. At a point near the town of Oxford, it became necessary for the train to back upon a side-track to permit a south-bound train to pass. The duty of the plaintiff at that time required him to be in the rear car of the train at the brake, which is located about the center of the car, a distance of about fourteen feet from the rear door. The plaintiff knew the location of the brake and the doors of the car. At the time he was injured, he was standing at the brake "trimming his lamp preparatory to the further discharge of his duties on the train." He was thrown from the "car by the jerking and lurching motion of the train while it was running backward upon the side-track, which motion was caused

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by the unevenness and roughness of the track." The plaintiff had made three or four trips over the road prior to his injury. The side-track was at the time of the accident "new, unfinished and uneven," the cross-ties were laid upon a fill, the earth grade of which was newly thrown up. The rails were spiked to the cross-ties. The spaces between the ties were not filled, and no provision was made to hold the ties in place. The plaintiff passed the side-track in daylight the day preceding that on which he was injured, "and occupied such a position on the train as to be in full view of the side-track, and could have seen it by looking, for its condition was open and obvious."

It is evident from the facts stated in the special verdict that the cause of the appellant being thrown from the car was the motion of the car, and that this motion was due to the condition of the side-track. The statements in the verdict concerning the construction of the car, the lack of steps, and the insufficiency of the brakes, are, therefore, of no importance. The proximate cause of the misfortune was the condition of the side track, for there is nothing from which it can be inferred that the accident was owing to the construction of the car or to any defect in its appliances.

It is firmly settled in this State that the plaintiff in such a case as this must affirmatively show that he was free from contributory negligence. We can find no direct facts showing that the appellant exercised ordinary care. He was bound to exercise care proportionate to the dangers of his service. He was bound to know what was open and obvious, and, as it is expressly and directly stated as a fact that the condition of the side-track was "open and obvious," we must presume that he had notice. Having this notice, he was bound to exercise care to avoid being thrown from the car by the "jerking and lurching motion," caused by the uneven and insecurely fastened track. We do not think it can be inferred from the fact that he was standing on the top of the car near the brake trimming his lamp, that he was

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free from contributory negligence. We are, indeed, strongly inclined to think that the inference is that he did not exercise such care as the situation and surroundings required of him.

It is the duty of the employer to use ordinary care to provide a safe working place and appliances for his employees, but he is not an insurer. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Cincinnati, etc., R. W. Co. v. Roesch*, 126 Ind. 445. While it is the duty of the employer to exercise care to protect those in his service, still, there are perils incident to the service of which the employee assumes the risk. *Rogers v. Leyden*, 127 Ind. 50, and cases cited; *Jenny, etc., Co. v. Murphy*, 115 Ind. 566; *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566.

As we have said, in considering another branch of the case, it is the duty of the employees to use reasonable care to ascertain the ordinary perils of the service which they voluntarily enter, and they are presumed to take service with knowledge of such perils as are open and obvious. *Cincinnati, etc., R. R. Co. v. McMullen*, 117 Ind. 439; *Louisville, etc., R. W. Co. v. Buck*, *supra*; *Umbach v. Lake Shore, etc., R. R. Co.*, 83 Ind. 191; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Louisville, etc., R. W. Co. v. Corps*, 124 Ind. 427, and cases cited; *Vincennes Water Supply Co. v. White*, 124 Ind. 376.

The facts stated in the special verdict require the conclusion that the peril from the uneven track was one incident to the service in which the appellant sought and obtained employment, inasmuch as the condition of the track was fully open to his notice.

We can not say that the facts stated show any negligent breach of the duty owing by the employer to the employee. There is no fact from which it can be inferred that the employer had not done all that the time and circumstances allowed to make the side-track safe. For anything that ap-

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pears in the special verdict, the appellee may have exercised reasonable care and diligence in laying the side-track, for it appears to have been a new track at the time of the appellant's injury.

The appellee was under no obligation to examine the appellant as to his experience for the place he sought and obtained. *Pittsburgh, etc., R. W. Co. v. Adams, supra.* The appellant was not a child of tender age, and hence not within the rule that children must be warned of the dangers of the service into which they are taken, and properly instructed as to the duties required of them.

Whatever view may be taken of the facts stated by the jury, it is clear that the conclusion reached by the trial court was right.

Judgment affirmed.

COFFEY, J., did not take part in the decision of this case.

Filed June 14, 1892.

No. 16,174.

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COMPANY.

MUNICIPAL CORPORATION.—*Ordinance Providing for Supply of Gas.—Construction of.—Exclusive Privilege.*—The defendant passed an ordinance granting to the plaintiff's assignors, for a period of twenty-five years, the privilege of laying gas mains, to supply gas for illuminating purposes, along certain streets of the city. It was provided that the defendant should maintain a certain number of lamp-posts, and such additional lamp-posts and lamps along said mains as the city council might from time to time direct. It was further provided that, upon the erection of said lamps, the city should take sufficient gas from the company to keep the said lamps lighted, and should pay at the rate of three dollars per month for each and every lamp. Afterwards an extension of the mains was ordered, and the plaintiff submitted a proposition concerning the use and payment of the additional lamps to be provided. The propo-

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136	677
132	114
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sition was accepted by the common council, with the stipulation "that it be in force no longer time than the original contract." This subsequent arrangement was referred to as a contract in a number of resolutions passed by the common council in ordering the extension of mains.

Held, that although no definite time was mentioned in the ordinance during which the defendant was obligated to take gas for lighting its street lamps, the interpretation of the ordinance by the ordinary rules of construction and the acts of the parties thereunder, show that, by the ordinance, the city contracted to pay for twenty-five years for the gas furnished by the lamps provided for therein and by those afterward erected.

Held, also, that the ordinance did not grant an exclusive use of the streets, and that a monopoly was not given for supplying the city with gas for street lighting purposes.

Held, also, that the contract was not void on account of any supposed surrender by the common council of its legislative power.

SAME.—Right to Contract for Supply of Gas.—What Period not Considered Unreasonable.—A city has the power to contract for a supply of gas or water for a period extending beyond the tenure of office of the individual members of the common council making such contract. It can not be said that twenty-five years is an unreasonable time for which to contract for a supply of light or water.

SAME.—Act of March 3d, 1883, Construed.—The act of March 3d, 1883 (Elliott's Supp., section 794), authorizing the common councils of cities to contract for light for its streets and alleys for a period of time not exceeding ten years, does not affect the contract sued on. By the fourth section of the act, existing contracts, except such as confer exclusive privileges, are declared to be valid. The contract involved did not confer exclusive privileges, and it is therefore not affected by said act.

SAME.—Pleading.—Answer.—Conflict of Ordinances.—In an action brought by the plaintiff to recover for gas supplied to the defendant for public street lighting, under said ordinance, a demurrer was properly sustained to a paragraph of answer which alleged that, at the time of the passage of said ordinance, an ordinance of the defendant was in force which required that proposals for work, the estimated cost of which should exceed \$40, should be let to the lowest bidder after a notice for proposals had been given by publication, and that the ordinance in suit was passed in violation of this ordinance. The ordinance claimed to have been violated evidently referred to work done for the city, and not to contracts such as the one in suit. If the passage of the ordinance sued on was within the prohibition of the other ordinance, its passage repealed it *pro tanto*.

SAME.—Answer.—Attempted Partial Annulment of Contract.—A paragraph of answer was also bad which alleged that the common council, by resolution, prohibited the plaintiff from supplying gas after a certain date for ten of the lamp-posts specified in the complaint. The contract was

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mutually binding upon both the contracting parties, and neither could, by its own act, prejudice the position of the other.

CONTRACT.—*Ambiguous.*—*Construction of by Parties.*—*Duty of Court.*—It is the duty of a court, where the language of a contract is indefinite or ambiguous, to adopt the construction and practical interpretation which the parties themselves have put upon the contract, and to enforce that construction.

PRACTICE.—*Appeal.*—*New Trial.*—*Amount of Recovery.*—In order to present a question on appeal, relating to the amount of the recovery, it must be assigned as a cause for a new trial.

From the Knox Circuit Court.

J. T. Goodman, W. A. Cullop, C. B. Kessinger, J. M. Butler, A. H. Snow and J. M. Butler, Jr., for appellant.

W. H. De Wolf, G. E. Reily and J. W. Emerson, for appellee.

MILLER, J.—The appellee brought this suit against the appellant to recover for gas supplied to appellant for public street lighting for a period of ten months under the provisions of an ordinance enacted by the common council of the city and accepted by the appellee.

The ordinance is as follows:

“An ordinance to provide for the lighting of the city of Vincennes, Indiana, with gas.

“Section 1. There is hereby granted and secured to Laz. Noble and associates, their successors and assigns, the privilege of laying gas mains and pipes for supplying illuminating coal gas along the several streets, alleys, thoroughfares and public grounds of the city for twenty-five years from the date of this ordinance, the said mains and pipes to be so laid as not to interfere with the drainage or sewerage of said city, but, before laying down any such mains or pipes, five days' notice shall be given to the mayor of the commencement of the work, and such mains or pipes shall be laid with reasonable diligence, and the streets and alleys shall be repaired and restored to their original condition without delay.

“Sec. 2. That for the purpose of supplying gaslight up-

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on the several streets of said city, the said Laz. Noble and associates, their successors and assigns, shall lay down the required mains and pipes to supply gas for lighting the street lamps at the several street crossings along the following streets, viz.: (Omitted.)

"Sec. 3. The said Laz. Noble and associates, their successors or assigns, may erect within said city all suitable and necessary buildings and works for making illuminating coal gas of the most approved quality and purity for supplying the public lamps and private consumers of said city, and shall at all times supply the same in sufficient quantities for the public use as well as for private consumption. Said works to be completed and in operation on or before the first day of September, 1876, and in case they are not so completed, the rights and privileges hereby granted shall cease and be void.

"Sec. 4. Upon the laying of the mains and pipes as above provided, the city of Vincennes shall erect and maintain at the several street crossings within the limits prescribed in the above section two, at least two public lamp posts with lamps, having all the needed fittings and fixtures for lighting, and may also erect and maintain along the lines of said mains and pipes such additional lamp posts and lamps as the city council may from time to time direct, and, upon the erection of said lamps, said city shall take from the gas works, so to be erected, sufficient gas to keep said lamps lighted as similar lamps are usually lighted in other cities. The public lamps already located on the lines of said proposed mains, belonging to the city, where the same are properly located, are to be included as part of the number provided for in this ordinance.

"Sec. 5. The said Laz. Noble and associates, their successors and assigns, shall at all times supply all the public lamps with illuminating coal gas, of approved quality and pureness, and of illuminating power equal to standard, fourteen sperm candle light, the burners to be used to be five

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feet burners; and they further agree to light and extinguish the public lamps according to the 'American Meter Company's' time tables in use for lighting and extinguishing similar lamps in cities generally, and to furnish gas, light, clean and extinguish such lamps, for all of which the said city of Vincennes shall pay, them at the rate of three dollars per month for each and every lamp so furnished with gas, lighted, extinguished and cleaned, in monthly payments. And they also agree to supply all other lamps of the city, and the inhabitants who may desire it, with coal gas, as aforesaid, for their private use, at the rate of three dollars per 1,000 cubic feet, payable on bills rendered monthly. They shall make all needed repairs to the public lamps, purchase the material therefor, and render bills therefor against the city at cost, for payment.

"Sec. 6. The said Laz. Noble and associates, their successors and assigns, agree to extend their mains along the same, or other streets, whenever so required by the city council, provided there shall be found at least three average private consumers upon each square upon such proposed extension. And if the city council shall determine at any time to light any street or thoroughfare beyond the limits herein before specified, the said city council may at the city's expense extend the pipes and erect such additional posts and lamps as they may deem proper, and such lamps shall be lighted, extinguished and cleaned on the same terms as others are. Any pipes so laid shall only be used for supplying the public lamps, unless said Noble and associates, their successors and assigns, shall pay the city for said extended pipes.

"Sec. 7. The said Laz. Noble and associates may organize as a joint stock company, under the laws of the State of Indiana, for the purpose of constructing, equipping and operating the gas works contemplated in this ordinance, and in case they shall so organize, all the rights, privileges and agreements contained herein shall enure to such company.

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"Sec. 8. The city reserves the right to test at all times the accuracy of the meters, and the quality and purity of the gas, by any competent agent that may be appointed by the city council.

"Sec. 9. The said Noble and associates shall enter into bond with surety for the performance of the stipulations in this ordinance in the penalty of ten thousand dollars, within forty days from the passage hereof, and, on failure so to do, this ordinance and all the rights conferred therein shall be null and void.

W. H. H. BEESON,

"Mayor."

"Passed December 27th, 1875.

"Attest: EMIL GULL,

"City Clerk."

The complaint shows that after the passage of the ordinance the appellee company was organized, and received from Laz. Noble and associates an assignment of all their rights conferred by the ordinance, and that on the 22d day of May, 1876, the appellee notified the appellant, in writing, of their acceptance of the terms and provisions of said ordinance; that the company erected the works, laid the mains authorized by the ordinance, and in all respects complied with its terms and conditions.

The complaint shows that, within a short time after the completion of the works, as originally agreed upon, petitions were filed with the common council by citizens and taxpayers for an extension of the mains, and the location of additional lamps was ordered.

This was continued from time to time until April, 1880, when the city ordered the mains so extended as to provide for fifty additional lamps. The gas company hesitated in agreeing to the extension, but after some negotiations between the city and gas company, a proposition was made in writing by the company to the city council, in which this language was used:

"As this work will necessitate a very large expenditure of

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money by the company, and many years will probably elapse before any adequate returns will be realized, the company will require that upon the first of each month, lamps upon any streets that are ready for lighting shall be put in use without waiting the completion of the entire work. As a large quantity of materials must be contracted for, and other necessary preparations be made, an early disposition of the above proposition is desired. If this proposition is agreed to, it is expressly understood that it shall in no respect affect or change the contract existing between the city and the company."

In reporting this proposition to the city council, the committee on gas, who were conducting the negotiations on the part of the city, said :

"We recommend that the proposition be accepted, with the stipulation that it be in force for no longer time than the original contract, and end at the time when said original contract ends."

This report was received and concurred in by the council, and the mains were extended and lamp posts put up and supplied with gas by the company.

The arrangement between the city and gas company was referred to as a "contract" in many other resolutions adopted by the city council in ordering extensions of the mains and location of lamp posts.

It is averred in the complaint that the company supplied gas of the proper quality for the lamp posts agreed upon, amounting in all to two hundred and thirty-two posts, continuously from the time of their erection until the beginning of the suit, that the city paid the company at the rate of three dollars per lamp, per month, for all of the lamps up to and including November, 1889, but refused to pay the monthly bills of \$696 each, from December 1st, 1889, up to and including October, 1890, though demand for payment was made soon after the expiration of each month.

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A demurrer for want of facts was filed to the complaint and overruled, and the ruling is assigned as error here.

The appellant contends that the ordinance of December 27, 1875, and its acceptance by the appellee do not constitute an agreement binding the city to buy gas from the company for lighting the streets of the city for twenty-five years; that, fairly construed, it gives the company the right to use streets of the city for that length of time, but that the grant is not exclusive, and that the city might grant another gas company the use of the same streets; that the ordinance fixes the price to be paid by the city *per lamp per month* so long as the city desires to take gas from the company, but no longer.

No time is fixed in express words during which the city was to take gas from the company for lighting its street lamps. This makes it important to determine the rules of construction to be applied to the ordinance under consideration.

It is insisted by the appellant that the ordinance is simply a grant of the franchise to lay pipes and mains in the streets, alleys and thoroughfares of the city for the purpose of supplying it, and its inhabitants, with gas; and that in such cases the grant is to be taken strongly against the grantee, and nothing is to be taken by implication against the public, except that which necessarily flows from the nature of the grant. *Indianapolis, etc., R. R. Co. v. Citizens', etc., R. R. Co.*, 127 Ind. 369, and cases there cited, sustain this doctrine where the ordinance simply grants a franchise. We are, however, of the opinion that the ordinance under consideration is something more than a grant. It is a grant in so far as it confers upon the company the right to lay its mains and pipes in the public streets, and if the controversy in this case related to the nature and extent of that grant, these authorities would be in point and of importance.

In addition to the grant above referred to, the ordinance embodies a contract between the city and the company for

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the supply of gas. It is this contract which is in dispute, and which furnished the subject-matter of this controversy.

The ordinance was, in effect, an offer by the city, the acceptance of which by the company created a contract between the parties, measured, like any other contract, by the terms and conditions of the writings. We see no reason why the contract thus formed should not be construed and interpreted like any other written contract.

We are to look to the language employed, and in case terms are ambiguous, or susceptible of more than one meaning, may, in order to arrive at the intention of the parties, inquire as to their situation at the time the contract was entered into, and the purpose to be accomplished by its execution. *Beard v. Lofton*, 102 Ind. 408; *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 62; *Lyon v. Lenon*, 106 Ind. 567.

In 5 *Lawson Rights and Remedies*, section 2316, the rule of interpretation is expressed in this language:

"In all contracts where the meaning of language is to be determined by the court, the governing principle must be to ascertain the intention of the parties through the words they have used. This principle is one of universal application. So every part of a document should be construed with reference to the intention of the parties, as to the whole contract. To ascertain that intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view."

We are forced to the conclusion that at the time the ordinance was enacted by the common council of the city, and accepted by the gas company, it was mutually understood that the company was to furnish gas for street lighting, and the city was to pay for gas so furnished, at the agreed price, for the period of twenty-five years.

It is evident that the company was unwilling to put in the plant, or, after it was put in and in operation, to extend the mains, unless both the city and private consumers would agree to take gas. We can not but know that it is the almost

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universal custom for companies and individuals, contracting to furnish either water or gas, before undertaking the large expenditure necessary to putting in the necessary plant, to require a contract for taking water or gas for public use for a specified time and at an agreed price.

The only time mentioned in the ordinance that could in any manner fix the time during which the gas for street lighting should be furnished by the company, and paid for by the city, is twenty-five years. If the contract is not for that period of time, no time is fixed, and the city might, immediately upon the completion of the work, have discontinued the use of gas in its streets. We can not believe that the parties intended to leave the use of gas for street lighting to the uncontrolled option of one of the contracting parties. If this is the construction to be placed upon the ordinance, it amounts to little more than a grant of the use of the streets for laying pipes and mains; the city being able at any time to discontinue the use of its lamps, unless gas was furnished at its own price.

Whatever of doubt we might have entertained upon the construction of the ordinance is dispelled by the construction and practical interpretation placed upon it by the parties themselves in their subsequent dealings.

The stipulation in the contract made for extension of the mains and supply of gas for additional lamps, that the arrangement should "be in force for no longer a time than the original contract, and end at the time when said original contract ends," shows that both the contracting parties, at the time when this language was used, understood that some time was fixed in the original contract for the termination of the agreement made by the company, on the one hand, to furnish gas, and by the city, on the other, to pay for the same at the agreed price.

This time must, we think, necessarily be at the end of the twenty-five years mentioned in section one of the ordinance.

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That it is the duty of a court, where the language of a contract is indefinite or ambiguous, to adopt the construction and practical interpretation which the parties themselves have put upon the contract, and to enforce that construction, has been so often asserted by this and other courts that no doubt of its soundness can be entertained. *Ingle v. Norrington*, 126 Ind. 174; *Pate v. French*, 122 Ind. 10; *Louisville, etc., R. W. Co. v. Reynolds*, 118 Ind. 170; *Vinton v. Baldwin*, 95 Ind. 433.

We do not think this construction of the ordinance is subject to the objection that it, in effect, gives the company an exclusive privilege.

There is no exclusive grant to the company to the use of the streets. It may be that no other company is likely to attempt the occupancy of the same streets at or near the location of the mains and pipes of this company, but it is by no means impossible.

Whatever there is of an exclusive nature in the grant for the use of the streets is such as is the necessary result of all such grants. To deny the right to make grants that will not prevent a like occupancy by another company would prevent the construction of plants for the distribution of gas and water, or the use of streets for street railways, for two railways can not occupy the same space in a street. *Indianapolis, etc., R. R. Co. v. Citizens', etc., R. R. Co., supra*.

So far as the ordinance gives the company the use of the streets it is in the nature of a license, and not exclusive. *Crowder v. Town of Sullivan*, 128 Ind. 486; *Rushville Gas Co. v. City of Rushville*, 121 Ind. 206.

Neither does the contract give the company a monopoly of supplying gas to the city for street lighting. The city agrees to take a certain quantity of gas for a specified period of time, leaving it the unrestricted right to either manufacture or purchase as much more as it desires. This is not the class of contracts which the law denounces as monopolistic.

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The making of contracts for the supply of light and water for a considerable time, at fixed prices, is ordinarily necessary and permissible. *Crowder v. Town of Sullivan, supra*; *Citizens', etc., Co. v. Town of Elwood*, 114 Ind. 332.

There is in the ordinance no agreement or provision preventing the city from taking gas from any other company. The contract entered into relates to the street lamps mentioned in section two, and such "additional lamp posts as the city council may from time to time direct." The ordinance authorizes the city to compel the company to extend its mains and pipes, under certain conditions, and furnish light for additional lamps; but we do not understand the contract as one which compels the city to take gas from this company for all additional lamps which might be needed to light the city. As we construe the contract, the city might have restricted the gas company to the lamps provided for in section two, and contracted with some other company for all additional lamps; the liability of the city to pay for gas furnished for additional lamps being dependent upon contracts with the company, subsequently made, by which it was agreed that the mains should be extended and gas furnished upon the same terms and for the same period of time provided for in the original ordinance.

If the ordinance contained a provision by which the city agreed to take gas from no other company, or prohibiting any other company from engaging in the business of making and selling gas, the case of *Davenport v. Kleinschmidt*, 6 Mont. 502, and cases collated in *Matter of Union Ferry Co.*, 98 N. Y. 139 (150), would be in point.

In our opinion the contract was not void on account of any supposed surrender by the common council of its legislative power. Every contract, or ordinance in the nature of a contract, does to some extent limit and control the power and authority of future councils. This is and must be the unavoidable result of every binding contract. We do not re-

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gard this as being an open question in this State. In *City of Valparaiso v. Gardner*, 97 Ind. 1, this court said :

"There is a distinction between powers of a legislative character and powers of a business nature. The power to execute a contract for goods, for houses, for gas, for water and the like, is neither a judicial nor a legislative power, but is a purely business power. The question is, however, so firmly settled by authority that we deem it unnecessary to further discuss it. *City of Indianapolis v. Indianapolis, etc., Co.*, 66 Ind. 396 ; *Dillon Munic. Corp.* (4th ed.), sections 473, 474." See, also, *Crowder v. Town of Sullivan*, *supra* ; *New Orleans Gas-Light Co. v. City of New Orleans*, 42 La Ann. 188.

We discover nothing in the ordinance that contains any substantial limitations of the legislative power of the common council. The question of the extent to which the common council have power to change or alter the location of the lamp posts, when once established, is not before us in this appeal. We are of the opinion that nothing in the ordinance impairs the authority of the common council to make all needful changes in the grade of its streets. *Elliott Roads and Streets*, 334.

Whatever may be the law in other jurisdictions, this court is committed to the doctrine that a city has power to contract for a supply of gas or water for a stated period of time extending beyond the tenure of office of the individual members of the common council making such contract. *City of Indianapolis v. Indianapolis, etc., Co.*, *supra* ; *City of Valparaiso v. Gardner*, 97 Ind. 1.

While the facts in these cases are not precisely like the one before us, the discussion and decisions so fully cover the questions involved in this case that we do not deem it necessary to examine the questions at length.

The making of contracts for the supply of gas or water is a matter delegated to the governing powers of municipalities, to be exercised according to their own discretion, and in the absence of fraud, while acting within the authority del-

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egated to them, their action is not subject to review by the courts.

The length of time for which they shall bind their towns or cities depends upon so many circumstances and conditions as to situation, cost of supply and future prospects, that the courts can interfere only in extreme cases and upon seasonable application. We can not say that twenty-five years is an unreasonable time for which to contract for a supply of light or water.

Improvements made in the methods and cost of street lighting have in many instances rendered contracts that were fair and equitable when made seem now to be grinding and oppressive.

We are satisfied that the act of March, 3, 1883 (Elliott's Supp., section 794), did not affect the contract sued on. The first section of that act authorizes the common councils of cities to contract for lights for its streets and alleys for a period of time not exceeding ten years. By the fourth section of the act, existing contracts, such as confer exclusive privileges, are declared to be void.

We have arrived at the conclusion that the contract involved did not confer exclusive privileges, and it is therefore not affected by the legislation.

We do not decide that it is within the power of the Legislature to impair the obligation of such contracts, but simply that the act does not purport to do so. See, upon this subject, *City of Indianapolis v. Indianapolis, etc., Co.*, *supra*; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683.

In our opinion the court did not err in overruling the demurrer to the complaint.

Errors are assigned upon the action of the court in sustaining demurrers to several paragraphs of answer; but, as the discussion of the questions involved in the ruling of the court upon the demurrer to the complaint covered all the

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questions presented by the answers, except the second paragraph, we will not extend this opinion by referring to the others.

In the second paragraph of answer it is alleged that at the time of the passage of the ordinance mentioned in the complaint, an ordinance of the city of Vincennes was in force which required that proposals for work, the estimated cost of which exceeded forty dollars, be let to the lowest bidder after a notice for proposals had been given by publication; that the ordinance in suit was passed in violation of the terms of this ordinance.

It was also alleged in the answer that the common council, by resolution, prohibited the gas company from supplying gas for ten of the lamp posts specified after December 1st, 1889.

The action of the court in sustaining the demurrer to this paragraph of answer was not erroneous.

The ordinance claimed to have been violated evidently referred to work done for the city, and not to contracts such as this one.

If the passage of the ordinance sued on was within the prohibition of the other ordinance, its passage repealed it *pro tanto*. Dillon Munic. Corp. (4th ed.), section 314; *Inhabitants, etc., Burlington v. Estlow*, 43 N. J. L. 13; *Ex parte Wolf*, 14 Neb. 24.

The position of the appellant was not improved by the passage of an ordinance prohibiting the company from furnishing gas to ten of the street lamps. The contract was mutually binding upon both the contracting parties, and neither could, by its own act, prejudice the position of the other.

Objection is made to the allowance of interest upon the instalments, payable each month for gas furnished the city.

In order to present a question on appeal relating to the damages awarded, it must be assigned as a cause for a new trial. *Ringle v. First Nat'l Bank of Kendallville*, 107 Ind.

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425. No motion was made for a new trial in this case, and no question relating to the amount of the recovery can, therefore, be made in this court.

We find no error in the record.

Judgment affirmed.

Filed June 17, 1892.

No. 15,478.

THE TERRE HAUTE AND LOGANSFORT RAILROAD COMPANY v. SHERWOOD ET AL.

COMMON CARRIER.—*Transportation of Live Stock.—Owner Accompanying.*—

Liability of Carrier.—Where the property which a railroad company agreed to carry was live stock, and the owner undertook, by special contract entered into with the company, to go with the stock and care for it, he is bound to show that the injury or loss for which he is seeking to recover damages was not attributable to the failure to perform or the negligent or improper performance of acts which he undertook to perform. He must show that the injury was caused by the carrier's breach of duty.

SAME.—*Special Contract Exempting Carrier from Certain Perils.—Rule as to Recovery.—Burden of Proof.*—Although a carrier can not contract for exemption from his own fraud or negligence, he may limit his liability by special contract, and there can be no recovery where the loss is caused by one of the perils from which the contract exempts the carrier. The burden of establishing the exemption is, however, upon the company.

PLEADING.—*Several Demurrer.*—A demurrer in the following language: "Come now the defendants and demurr severally to each paragraph of the complaint as amended, because the same does not state facts sufficient to constitute a cause of action against defendants," must be regarded as a several demurrer addressed to each paragraph of the complaint.

PRACTICE.—*Demurrer.—Overruling of to Bad Paragraph of Complaint.*—Where a demurrer is erroneously overruled to a bad paragraph of a complaint, and it is not affirmatively shown by the record that the judgment rests on the good paragraphs, a reversal must be adjudged.

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CONTRACT.—*Special.—Breach of.—Pleading.*—Where a plaintiff declares upon a special contract, he must state facts showing an actionable breach of that contract, and he can not recover upon any contract except that upon which he specially declares.

From the Marshall Circuit Court.

J. G. Williams, H. Corbin and C. Kellison, for appellant.
O. M. Packard, C. P. Drummond and A. C. Capron, for appellees.

ELLIOTT, C. J.—The demurrer of the appellant is clumsily drawn, and it is difficult to determine whether it shall be treated as addressed to the entire complaint or as addressed distributively to each paragraph of that pleading. It reads thus: "Come now the defendants and demur severally to each paragraph of the complaint as amended, because the same does not state facts sufficient to constitute a cause of action against defendants." We regard the demurrer as a several one addressed to each paragraph of the complaint. The demurrer employs the term "severally," as directed against each paragraph, and the words "the same" must be regarded as referring to each paragraph, and not to the entire complaint. Our conclusion is supported by the cases of *Silvers v. Junction R. R. Co.*, 43 Ind. 435; *Stribling v. Brougher*, 79 Ind. 328; *Mitchell v. Stinson*, 80 Ind. 324; *Clodfelter v. Hulett*, 92 Ind. 426; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75. The language employed in the demurrer before us is different from that used in *Baker v. Groves*, 1 Ind. App. 522, and the cases are, therefore, to be discriminated. The case referred to goes quite as far as the authorities warrant, and we are not willing to extend its doctrine.

The first paragraph of the complaint contains these allegations: That the plaintiffs are partners; that as such they made a contract with the defendant, a common carrier, to transport eighty horses from East St. Louis, Illinois, to Plymouth, Indiana; that the plaintiffs delivered the horses to the defendant and paid the freight thereon as fixed by the

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contract; that the defendant "undertook to carry safely and securely for the plaintiffs;" that "the defendant did not carry and deliver the horses, but failed to do so, whereby they were wholly lost to the plaintiffs." The contracts under which the horses were shipped, three in number, were made part of the paragraph by reference, and appear in the record as exhibits. The contracts incorporated in the pleading are the same, except as to dates, numbers and amounts, so that it is only necessary to copy the material parts of one of the three instruments. The parts deemed material by us read as follows: "Whereas, the Terre Haute and Indianapolis Railroad Company transport live stock only at first-class rates, as *per* their merchandise tariff, unless said company be released from all claims for damages resulting from the causes hereinafter specified. Now, for the purpose of obtaining transportation of the live stock hereinafter mentioned at the reduced rate granted by said company in consideration of being so released, this agreement made between said company, party of the first part, and Sherwood and Swoverland, parties of the second part, witnesseth, that, in consideration of being released from liability, as hereinafter specified, the said company agrees to transport one car load of horses from East St. Louis to Terre Haute, and forward the same from the last named station to Plymouth, Ind., *via* the T. H. L. Railroad, and agrees that the through rate to Plymouth shall not exceed fifty-two dollars per car and advanced charges; and further agrees to furnish free passage for one person entrusted by said party of the second part with the control of said animals while in transit. And it is expressly agreed, that the said company shall not be liable for any damages which may occur while said animals are being loaded or unloaded, or which may result from their being wild, vicious, unruly or weak, or their escaping or dying, or from their injuring or killing themselves or each other; or from heat, suffocation or improper loadings, or securing in the car or cars, or from said animals being

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crowded, or from the burning of hay or other material; nor shall the company be liable for delay in transportation, nor for any loss or damage of any kind after delivery at the station from which the company has agreed to forward said animals. The party of the second part agrees to send with said stock one or more men, as may be necessary to care for said stock while in transit, and to load, unload, feed and water said animals at his own risk and expense, the said company furnishing the necessary labor to assist (while in transit over its lines), under the direction and control of the person, put in charge thereof by the party of the second part."

The familiar rule is that each paragraph of a complaint must be good in itself, and must proceed upon a definite theory. *Montgomery v. Craig*, 128 Ind. 48, and cases cited; *Mescall v. Tully*, 91 Ind. 96.

The theory upon which the paragraph of the complaint under immediate mention proceeds is that the appellant is liable to the appellees in damages for a breach of a special contract. There are no allegations indicating that the pleader assumed to state a cause of action in tort; on the contrary, all of the allegations indicate that the pleader assumed to state a cause of action upon the special contracts incorporated in the pleading. The pleading is based solely upon the special contracts, and not upon any general or implied agreement or undertaking. The question, therefore, is this: Does the first paragraph state facts constituting a cause of action for a breach of the special contracts?

We suppose it entirely clear that where a plaintiff declares upon a special contract he must state facts showing an actionable breach of that contract, and that he can not recover upon any contract except that upon which he specially declares. *Lake Shore, etc., R. W. Co. v. Bennett*, 89 Ind. 457; *Hall v. Pennsylvania Co.*, 90 Ind. 459; *Fry v. Louisville, etc., R. W. Co.*, 103 Ind. 265; *Indianapolis, etc., R. R. Co. v. Remmy*, 13 Ind. 518. It is, as is well known, a settled rule of pleading that the complaint must state a complete cause

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of action. It is true, as appellant's counsel assert, that a complaint must affirmatively show that the defendant is in culpable default. *Lime City, etc., Ass'n v. Wagner*, 122 Ind. 78. These rules would determine the question as to the sufficiency of the pleading against the appellees if it could be assumed that it was essential to the existence of a cause of action for them to aver that the failure to transport was not attributable to some one of the causes or perils from which the carrier is released by the special contract. But this can not be always assumed, even where there is a special contract limiting liability. While there is a stiff contest among the authorities as to the burden of proof in such cases, we incline to the opinion that the true rule is, where the articles carried are not live stock, and there is no agreement that the owner's agent shall have charge of the property, the burden is upon the carrier to show that the injury or loss to the shipper was attributable to one of the causes or perils against which the special contract secures immunity.

The text-writers generally declare this doctrine. One of them says: "The shipper in the first instance makes out his case by proving his contract and the non-delivery of the goods. The burden of proof is then on the carrier to bring himself within the exemption clauses of the bill of lading, or, in other words, to show that the loss happened by one of the excepted perils. The reason is obvious. The goods were in his custody, and he is bound like all other bailees to account for their loss, if they are lost. The rule is the same where the goods are delivered in a damaged condition. The carrier must show that the damage was caused by one of the excepted causes or perils." *Wheeler Carriers*, 252. Another author says: "The burden of proving that a loss which has occurred falls within the exemptions provided for by the contract rests ordinarily upon the carrier. But where the loss occurs from such a cause that the law will not presume negligence, or where the loss happens from an excepted cause, as from fire, the burden of proving the car-

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rier's negligence is, by the weight of authority, upon the plaintiff." Hutchinson Carriers (2d ed.), sections 259a, 736. The rule that the burden is ordinarily on the carrier is supported by principle, and is a just and salutary one. The special contract, although it may release the carrier from some obligations and duties, does not take from him his character as a common carrier. As said by the court in *Witting v. St. Louis, etc., R. R. Co.*, 28 Mo. App. 103: "Though the goods may be carried under a special contract, relieving him from the liability of an insurer, still he is none the less a common carrier." In *Railroad Co. v. Lockwood*, 17 Wall. 357 (376), the court said: "But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation for the purpose of a carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." As the special contract does not take away the character of a common carrier, there remains, notwithstanding the express stipulations of the contract, certain obligations imposed by the law of the land, and these enter into the contract as silent factors. *Long v. Straus*, 107 Ind. 94. These obligations, although implied, are essential parts of the contract, and among them is the obligation to carry safely, so far as care and diligence will enable the carrier to do. When this obligation is violated, there is, in ordinary cases and with respect to inanimate property, *prima facie* an actionable breach of the contract. In cases where the carrier has full custody of the property there is, *prima facie*, at least, actionable breach of the contract when the failure to safely carry is shown, because, as said in the case of *Inman v. South Carolina R. W. Co.*, 129 U. S. 128 (139), "in case of loss the presumption is against the carrier."

The common law has been relaxed so as to permit a common carrier to limit his liability, but this change in the law does not go to the extent of allowing a carrier to contract

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for a complete exemption from liability, nor does it go to the extent of changing the rule that when the failure to carry is affirmatively shown, the burden of showing exemption from the duties and obligations imposed by law rests upon the carrier. The rule that the presumption is against the carrier, in cases where he has full charge and custody of the property, is in harmony with the doctrine sustained by a long line of cases, a line beginning far back in the early years of the common law and continuing unbroken to the present, that where injury to a passenger is shown the presumption is that the carrier was in fault. The rule that the burden is on the carrier, who has the exclusive custody of the property, is a reasonable one, inasmuch as it is but just to require the carrier who has the property in complete custody, who knows and controls the men, who manages the instrumentalities of transportation, and who has the means of explanation at hand, to show what caused the loss or injury, rather than to cast that burden upon the shipper, whose means of information are comparatively meager, and whose power of securing knowledge of the fact is circumscribed within very narrow limits. The question we have in hand was thoroughly discussed in the case of *Hull v. Chicago, etc., R. W. Co.*, 41 Minn. 510 (16 Am. St. R. 722); and in the course of the opinion it was said, in speaking of a carrier: "Ordinarily, one who delivers to him goods parts entirely with his possession and control over them, and knows nothing of what takes place during the carriage, while the carrier has possession and control over them, and is supposed to know, or have the means of knowing, what happens to them, and if they are lost or injured, how it occurred. The common law recognized the danger of collusion, connivance, and fraud between the carrier and his servants or others, which might leave the owner practically at the mercy of the carrier if he was required to prove negligence or fraud. To make such proof he would ordinarily have to call the very men whose recklessness or frailty caused the injury. To prevent

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this, the law excused the carrier only upon his proving that the loss or damage occurred from the act of God or public enemy—causes for which he could not be supposed to be responsible. The reasons which require the carrier to excuse himself for his failure apply with as much force to a case of limited as to a case of full common law liability.”

The question whether the rule to which we have referred applies to a case such as this remains for consideration. This case is, it is evident, not the ordinary one where the carrier has exclusive custody of inanimate property. Here we have a special contract made by the shipper and the carrier for the transportation of live stock at reduced rates of freight, and wherein it is provided that the latter shall be absolved from liability for designated perils, and that the former “shall send with said stock one or more men, as may be necessary, to care for said stock while in transit, to load, unload, feed and water said animals, at their own risk and expense.” The agreement of the owners to take charge of the animals exerts an important influence upon the case. The effect of this agreement is to place the animals in their immediate custody during transportation. Their agent is to care for them, and is to do the things expressly specified. The animals were not, therefore, in the exclusive custody and control of the carrier, so that the case is not within the reason of the rule that the carrier, and not the shipper, has the burden of proof, because the former has all the means of explanation and excuse at hand. Here the shippers, better than the carrier, can explain many things, and these things they do not undertake to explain, nor do they undertake to show that the loss was not attributable to a failure to perform acts they themselves agreed to perform. They agree that they will care for the animals, feed and water them, load and unload them, and they also agree that this shall be done at their own risk and expense. It seems clear, upon principle, that the owners are bound to aver and prove that the loss was not attributable to a failure to perform their

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part of the contract, or to negligence in performing the acts which they expressly undertook to perform. As to important things they were the actors, and they were in a position to know what was done or left undone, and they can not recover of the carrier without showing that the loss was not attributable to a breach of duty or violation of contract on their part, for they assumed duties as explicitly and fully as did the carrier.

In order to make a complete cause of action, they must show that the breach or wrong which caused the injury was that of the carrier, and not their own. It may be true, as averred, that the appellants did not carry and deliver the horses, and yet not true that it is liable, for it may be that the fault was that of the shippers. The courts can not assume in such a case as this, where there is a divided custody and dependent duties, that the defendant is liable because the horses were not safely transported and delivered. It may as well be assumed that the fault was that of the plaintiff as that it was the fault of the defendant, for there are here mutual agreements, mutual duties, and the shipper was placed in charge of the property. In view of the nature of the property to be carried, and of the express undertaking of the shippers to care for it while in transportation, we adjudge that it was incumbent upon the plaintiffs to show by the statement of appropriate facts that the loss was not attributable to a breach of the contract stipulations on their part. This they may easily do, if they have a cause of action, by showing what caused the injury to the horses or what was the cause of the failure to safely transport. Many of the cases apply the rule indicated to cases of inanimate property, but it is not necessary in this instance to go that far, and so we here go no further than to hold the rule applicable to cases of the shipment of live stock under a special contract wherein the owner undertakes to go with the stock and care for it while in transportation.

Our conclusion that where the property to be carried is

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live stock and the owner undertakes to go with and care for it he is bound to show that the injury or loss was not attributable to the failure to perform or the negligent or improper performance of acts which he undertook to perform, is required by authority. In the case of *St. Louis, etc., R. W. Co. v. Weakly*, 57 Ark. 397 (7 Am. S. R. 104, 117), the question received full consideration, and the court said: "Under the contract, they (the shippers) took charge of the stock during transportation, and relieved appellant of any responsibility for the discharge of the duties of a common carrier which they undertook to perform, and confined its duties, by the Memphis contract, to the furnishing suitable cars and hauling them to the place of destination. Having the care of the stock, the liabilities of a common carrier, which made it his duty to account for the loss of freight, did not devolve on appellant. Being in charge, they are presumed to know the cause of the loss of the jack found dead, if either party to the contract does; and the burden of proof is upon them to show that the default or negligence of appellant was the cause before they can be entitled to recover." We regard the case from which we have quoted as correctly deciding the question with which we are immediately concerned, although we are not prepared to yield to it upon some other questions, nor are we quite willing to acquiesce in the doctrine upon the question to which we cite it as broadly as it is stated, for we think the common carrier is always bound to account for a breach of duty not assumed by the shipper or not covered by an effective exonerating stipulation of the contract between the parties. It is true, as declared by the court in the case cited, that the carrier is not responsible for the failure to perform duties assumed by the shipper, and it necessarily follows from this that to the extent that the shipper takes duties upon himself to that extent they cease to be the duties of the carrier, and as they cease to be the duties of the carrier there can be no liability on his part for a breach or a failure to perform. A terse statement of what we regard as the cor-

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rect rule is given by the court in *McBeath v. Wabash, etc., R. R. Co.*, 20 Mo. App. 445, and it is this: "Ordinarily the *onus* is on the defendant to account for the stock, but in case of special contract, whereby the owner agrees to and does take charge of the stock, the burden of proving negligence is upon the plaintiff." It is, of course, true that the plaintiff may recover where there is a breach of the special contract by the carrier as well as where there is negligence, but this does not affect the principle stated in the case from which we have quoted, for if the duty, whether created by contract or imposed by law, which is violated is that of the plaintiff, there can be no recovery, so that there can be no complete cause of action unless it appears that the plaintiff in charge of the property was himself free from fault or wrong. This may be made to appear by showing the cause of the failure to carry, or of the injury, and that the failure or injury arose from a breach of the legal or contract duty resting upon the carrier. The doctrine to which we have given our sanction was thus asserted in *Louisville, etc., R. R. Co. v. Hedger*, 9 Bush, 645: "Where the owner contracts, however, to load and unload his stock, and to take charge of them during transportation, as in this case, and does in fact do so, the burden of proof, where the company is charged with negligence for the loss or injury to the stock, is upon the owner, as the party who has the care of the property is presumed to know how the injury occurred, and must himself suffer the loss unless negligence is shown on the part of the carrier or his employees." The court in the case from which we have just quoted strongly marks what we consider a peculiar and distinctive feature of this class of cases, namely, the custody and care of the stock by the owner under the special contract. This peculiar feature, as we have already impliedly indicated, marks the class as one different from that in which the shipper has not the care of the property, and assumes no special duties concerning it during transportation. It is evident that the rule applied to this class of cases is one of sound

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practical justice, since it is but fair and reasonable that the person in immediate charge of live stock should show how it was injured, as no one has, presumably, at least, superior means or opportunities of knowledge. We do not mean that it is necessary for him to show the specific cause of the injury, but we do mean that it is necessary for him to show the cause of the injury with so much detail and clearness as shall make it appear that the injury was caused by a breach of contract or legal duty on the part of the carrier, and not by neglect or failure of himself to do what he bound himself in his special contract to do. Other cases give our conclusion strong support, but we can not prolong this opinion by commenting upon them, and so cite them without comment. *Clark v. St. Louis, etc., R. W. Co.*, 64 Mo. 440 (448); *Harvey v. Rose*, 26 Ark. 3; *Kansas Pacific R. W. Co. v. Reynolds*, 8 Kan. 623 (641). We can not escape the conclusion that principle and authority require that the first paragraph be adjudged to be fatally defective.

The second paragraph of the complaint declares upon the same contracts as those upon which the first paragraph is based, but avers that the injury to the horses was caused by the wrecking and derailing of the train, and that the negligence of the appellant in failing to keep its road and cars in repair, and in managing the train, caused the wreck and resulting injury. This averment makes the paragraph good, inasmuch as it affirmatively shows that the injury was caused by the carrier's breach of duty, and thus excludes the inference that it was attributable to any failure to perform the duties assumed by the appellees. The third paragraph of the complaint avers with greater particularity the cause of the injury, and shows that the fault was that of the appellant, and is sufficient.

The appellant had a right to test the sufficiency of each paragraph of the complaint, and as the first is bad the judgment must be reversed, inasmuch as we can not say from the record proper that the judgment rests entirely upon the good

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paragraphs of the pleading. Where a demurrer is erroneously overruled to a bad paragraph of a complaint, and it is not affirmatively shown by the record proper that the judgment rests on the good paragraphs, a reversal must be adjudged. This has long been the settled law of this State. See authorities cited in Elliott App. Proc., sections 638, 666, 669. But if we should depart from this settled rule, it would do the appellees no good, for it is evident that the trial court put the case to the jury upon a radically erroneous theory. In proof of this it is sufficient to quote from the second instruction, given at the appellees' request, this language: "And I now instruct you that if you find from the evidence that the plaintiffs and the defendant did enter into said written contracts, and the three car loads of horses were delivered by plaintiffs to defendant at East St. Louis, and loaded on defendant's cars, to be carried and transported to the city of Plymouth, Indiana, over the lines of railway operated by defendant, and you further believe from the evidence that the defendant failed to deliver all or any of the horses mentioned in said live-stock contracts to the plaintiffs at the city of Plymouth, then in such case your verdict should be for the plaintiffs."

The doctrine thus broadly declared is unsound. It would not be sound even in cases where the special contract does not require the shipper to assume charge of the stock, for it is conclusively settled that a carrier may limit his liability, and that where the liability is limited by special contract, there can be no recovery in cases where the loss is caused by one of the perils from which the contract effectively exempts the carrier. *Michigan, etc., R. R. Co. v. Heaton*, 37 Ind. 448 (10 Am. R. 89); *Ohio, etc., R. R. Co. v. Selby*, 47 Ind. 471 (17 Am. R. 719); *St. Louis, etc., R. R. Co. v. Smuck*, 49 Ind. 302; *Adams Ex. Co. v. Fendrick*, 38 Ind. 150; *Indianapolis, etc., R. R. Co. v. Allen*, 31 Ind. 394; *Rosenfeld v. Peoria, etc., R. W. Co.*, 103 Ind. 121. There is, indeed, no contrariety of opinion upon the proposition that a special

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contract may be made limiting the liability of a carrier, nor is there any conflict upon the proposition that where the loss is caused by one of the perils from which the contract exonerates the carrier there is no liability. While a carrier can not contract for exemption from his own fraud or negligence, he may, by special contract, free himself from many common law liabilities. *Railroad Co. v. Lockwood*, *supra*; *Kansas, etc., R. R. Co. v. Simpson*, 30 Kan. 645 (46 Am. R. 104); *United States, etc., Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich, etc., Co.*, 55 Wis. 319 (42 Am. R. 713); *Moulton v. St. Paul, etc., R. R. Co.*, 31 Minn. 85 (47 Am. R. 781); *Bartlett v. Pittsburgh, etc., R. W. Co.*, 94 Ind. 281 (288). It is doubtful, under the authorities, whether the instruction would be correct even if there were no special contract, since it is held by many cases that where live stock is carried, it is not enough to show a mere failure to deliver. *Pittsburgh, etc., R. W. Co. v. Hollowell*, 65 Ind. 188; *Pittsburgh, etc., R. R. Co. v. Hazen*, 84 Ill. 36 (25 Am. R. 422); *Bartlett v. Pittsburgh, etc., R. R. Co.*, *supra*; *The Saragosa*, 3 Woods (C. C.), 380; *Clarke v. Rochester, etc., R. R. Co.*, 14 N. Y. 570 (67 Am. Dec. 205); *Michigan, etc., R. R. Co. v. McDonough*, 21 Mich. 165. But whatever may be the rule where live stock is carried, and there is no special limiting contract, it is quite clear that where live stock is transported under such a special contract as that referred to in the instructions in this case there is no unrestricted common law liability, and the plaintiff can not recover solely upon evidence of a failure to deliver.

Judgment reversed.

Filed Sept. 13, 1892.

Bachelor v. Cole et al.

No. 15,841.

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DRAINAGE.—Establishment of Ditch.—Appeal.—Right to Trial by Jury.—In a proceeding to establish a drain, a party upon appeal to the circuit court, is entitled to a trial by jury. Under the code of 1852 he had the right to a trial by jury, and the act of 1881 (section 409, R. S. 1881), making causes which were of exclusive equitable jurisdiction prior to 1852 triable by the court, has in no way changed or interfered with such right. See also section 4302, R. S. 1881.

From the Steuben Circuit Court.

F. S. Roby, for appellant.

OLDS, J.—The appellant and two others filed a petition in the commissioners' court of Steuben county for a drain. The drain was established by the commissioners' court, and the appellees, William H. and Nettie Cole, appealed to the circuit court.

In the circuit court the appellant demanded a trial by jury, which the court refused. Appellant excepted.

The question as to whether or not in such a case a party is entitled to a trial by jury is properly presented.

Under the code of 1852 parties were entitled to trial by jury in all cases where there was an issue of fact. By the act of 1881, section 409, R. S. 1881, causes which were of exclusive equitable jurisdiction prior to 1852 were made triable by the court. It would seem that by this latter act the right of trial by jury in such cases as the one at bar was in no way changed or interfered with. The act authorizing drainage proceedings before county boards of commissioners would appear to contemplate the trial of the issues in the circuit court on appeal by a jury. Section 18 of the act, section 4302, R. S. 1881, provides that "If more than one party appeal, the judge of the circuit court should order the cases to be consolidated and tried

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together; and the rights of each party shall be separately determined by the jury in its verdict."

The proceedings before the board of commissioners for the construction of drains is purely statutory, and when an appeal is taken to the circuit court they stand for trial *de novo*. *Hardy v. McKinney*, 107 Ind. 364.

In statutory actions to quiet title it has been held that either party is entitled to a jury. *Johnson v. Taylor*, 106 Ind. 89. In *Hardy v. McKinney*, *supra*, the court, it would seem, regarded drainage causes on appeal to the circuit court as triable by jury. That was a drainage proceeding commenced before the board of commissioners, and the court says: "In appeals to the circuit court in cases like the one in hearing, and in all analogous cases, the court or jury trying the same succeeds to all the substantial duties which devolved upon the viewers and reviewers before the board of commissioners as to the matters which stand for trial *de novo*, and a finding or verdict in detail upon all the matters in issue between the parties is contemplated."

In highway cases which are of a similar character either party is entitled to a jury. As to the object of the appeal in such cases, this court has said that it was to give the parties the benefit of a trial of questions of fact, in a court where a jury can be called. *Burtweiser v. Fahrman*, 88 Ind. 28 (33).

The appellant was entitled to a trial by jury, and the court erred in refusing his demand for a trial by jury

Judgment reversed at costs of appellees, with instructions to sustain appellant's motion for new trial, and to proceed in accordance with this opinion.

Filed June 17, 1892.

Smith v. The State.

No. 16,538.

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CONTINUANCE.—*Affidavit for.*—*Criminal Prosecution.*—*Employment of Counsel*—*Engagement of Counsel.*—*Diligence.*—An affidavit for a continuance in a criminal cause is insufficient which alleges as a ground for the application that the defendant was arrested and placed in jail the day after the commission of the offence, and has remained in confinement from that time until the filing of the affidavit; that he has been without means to employ counsel, or prepare for trial, and that he did not employ counsel until the present term of the court (the term at which the indictment was returned), but which fails to show any change in the defendant's pecuniary condition, whereby it was easier for him to procure counsel at the time of the return of the indictment than at the time of the arrest. The affidavit also failed to show sufficient excuse for not preparing for trial after the employment of counsel in alleging that the attorneys employed by the affiant had since the employment been engaged in other suits pending in the same court, and had been unable to look after his defence or make any preparation whatever therefor.

SAME.—*Absence of Witnesses.*—*Materiality of Testimony.*—*What Affidavit must Show.*—When an affidavit for a continuance is based on the absence of witnesses, it is not sufficient, after setting forth the facts expected to be proved by the absent witnesses, to aver that the testimony sought will be material. The affidavit must show wherein it is material.

CRIMINAL LAW.—*Assault and Battery with Intent.*—*Proof of Specific Acts of Violence by Injured Party.*—In a prosecution for assault and battery with felonious intent, it was not error for the court to refuse to permit the defendant to prove that eight or nine years prior to the commission of the offence for which he was indicted, the injured party used a knife upon the victim, and that knowledge of this fact was brought to the defendant prior to the difficulty for which he was on trial. The evidence offered was inadmissible because proof of commission of specific acts of violence by the injured party prior to the difficulty could not be introduced in evidence. And in addition to this it was inadmissible on account of the remoteness in time.

From the Washington Circuit Court.

S. H. Mitchell and *R. B. Mitchell*, for appellant.

A. G. Smith, Attorney General, *W. T. Branaman*, Prosecuting Attorney, and *F. L. Prow*, for the State.

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MILLER, J.—The appellant was indicted, tried and convicted of an assault and battery with felonious intent.

The first specification in the assignment of errors calls in question the ruling of the court in refusing to grant the defendant a continuance of the case. Two reasons for a postponement of the trial were stated in the affidavit—one because of want of time and opportunity to prepare for trial; the other because of the absence of witnesses.

The affidavit shows that the alleged crime was committed on the 8d day of October, 1891; and that the defendant was arrested and placed in jail the next day, and therein confined up to the filing of the affidavit; that from the time of his arrest and incarceration he had been without means to employ counsel or prepare and look up his defence to the charge; that he had no counsel employed to defend him until the present term of this court, and about the 9th day of December, 1891; that at the last term of this court a firm of attorneys appeared for him, when he was arraigned on affidavit and information filed in the cause, but counselled him no further in the matter, and received no employment from him; that, having no means, he has been without counsel or assistance of any kind, except as above stated, until the 9th day of December, when the indictment was returned; that he has now employed said firm of attorneys, but that since their employment this court has been in session continuously, and his attorneys have been engaged in other suits pending in said court, and have been unable for want of time to look after his defence or make any preparation whatever therefor; that the place where the said alleged crime is said to have been committed is in the town of Little York, a distance of sixteen miles from this county seat, where affiant has been confined in jail, and that most of his witnesses reside in and about said town; that he has had no opportunity to look up his said witnesses and

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counsel with them, or the means with which to have others to do so. Said affiant further says that he has a good legal and valid defence to said charge contained and set forth in the indictment herein, and will, he believes, be prepared to present the same by the next term of this court.

Subsequent portions of the affidavit refer to the absence of witnesses, and need not be noticed in this connection.

We are of the opinion that the court did not err in refusing to continue the trial of the cause upon the showing above set forth.

It does not appear but that the appellant might have procured the services of counsel upon his first incarceration as easily as upon the return of the indictment two months afterward, no change having taken place in his financial condition. If without means to employ an attorney, the court doubtless would, upon a proper showing, have appointed some one competent to prepare and manage his defence.

Over two and one-half months intervened between the commission of the crime and the time fixed for trial. The exercise of ordinary diligence would have enabled the appellant to have procured the services of some one skilled in the law, and not too busy to prepare his case for trial. Neither does the affidavit show proper diligence in the preparation for trial after the return of the indictment and employment of counsel. The fact that his attorneys were engaged in other suits pending in court was no excuse for an entire want of preparation for this one. If such was the case suits of this class would seldom be promptly tried.

If his attorneys were so engaged as to render them unable by the exercise of due diligence to make preparation for trial, their own affidavits would have been better evidence of the fact. *Burchfield v. State*, 82 Ind. 580.

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The subsequent portion of the affidavit asks a continuance because of the absence of witnesses.

We are satisfied that the affidavit was not sufficient to require the court to order a continuance of the cause on this ground.

The facts proposed to be established by the testimony of the absent witnesses were in substance: That on the day of, and prior to the shooting for which the defendant was indicted, William B. Garriott, the injured party, was intoxicated, and made threats against the appellant, which were communicated to the appellant. Also, that when intoxicated Garriott was quarrelsome and dangerous.

The affidavit contains the general statement that "the evidence expected to be obtained from said witnesses is material." It also states "that he has a good, legal and valid defense to said charge." No other showing is made of the materiality of the evidence for which the continuance is asked.

This is not a sufficient showing of the materiality of the evidence. In *Hubbard v. State*, 7 Ind. 160, the rule is thus stated: "It is not sufficient to aver that the testimony sought will be material. Of that the court must judge, and facts enough must be stated to show the connection between the testimony sought, and the case to be tried." Other cases are to the same effect. *Gordon v. Spencer*, 2 Blackf. 286; *Moody v. People*, 20 Ill. 315; *Steele v. People*, 45 Ill. 152.

If the absent witnesses had been present at the trial, their evidence could only have been received in connection with the claim that the shooting was done in self defence, (*Bowlus v. State*, 130 Ind. 227; *Rauck v. State*, 110 Ind. 384; *Boyle v. State*, 97 Ind. 322; *Horback v. State*, 48 Tex. 242), and after evidence has been given showing that the required person has made, or was about to make, a violent assault upon the defendant. *Cannon v. People*, (Ill.) 30 N. E. R. 1027.

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No intimation was given in the affidavit that the defendant relied upon or expected to give evidence showing that he acted in self defence.

The defendant offered to prove that eight or nine years prior to this difficulty the injured party used a knife upon the witness, and that knowledge of this fact was brought to the defendant prior to the difficulty for which he was on trial.

Proof of the commission of specific acts of violence by the defendant prior to the difficulty could not be introduced in evidence, for this would necessarily involve inquiry as to the circumstances surrounding each of such occurrences, and the trial of cases would thus be greatly extended, and the issues so multiplied as to tend to create confusion in the minds of the jury.

In addition to this, the evidence offered was inadmissible on account of remoteness in time.

Some other offers to prove occurrences many years prior to the difficulty were made by the defendant and ruled out by the court. What we have above said sufficiently disposes of the questions thus raised.

We have examined the evidence, and are of the opinion that it sustains the verdict of the jury.

Judgment affirmed.

Filed September 13, 1892.

No. 16,151.

139	149
140	670

HATFIELD ET AL. v. THE HUNTINGTON CITY BUILDING, LOAN
AND SAVINGS ASSOCIATION.

BUILDING ASSOCIATION.—Foreclosure of Mortgage.—Constitution and By-Laws Part of Note.—In an action by a building association to foreclose a mortgage given to secure several notes, where, by the express terms of the notes, the constitution and by-laws of the association were made a part of the notes, the note and the constitution and by-laws constituted but one instrument, and as a copy of each was filed with the complaint, it was sufficient to refer to them as the note.

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SAME.—*Section 854 Elliott's Supp. Construed.*—In such an action it was not necessary to allege that the plaintiff had filed the written acceptance provided for by section 854, Elliott's Supp. It was not the intention of the Legislature by the passage of the act of which said section is a part to deprive existing building and loan associations of any of the rights they possessed under the laws in existence. The purpose of the act was to enlarge rather than to restrict their powers.

SAME.—*Retirement of Stock.—Distribution of Assets.—Set-Off.*—The fact that the appellee had retired the outstanding valid stock furnished no legal excuse for a failure on the part of the defendant to refund the money borrowed. If his stock had been forfeited, as claimed, for non-payment of dues, he no longer had any interest in the assets of the association. Such assets belong to those who kept their stock alive by the payment of their dues, and for the purpose of distributing such assets the plaintiff has the right to collect and convert them into cash. If sufficient funds have been paid to retire the unforfeited stock, while the defendant has failed and neglected to pay the assessment due from him, those who paid contributed more than their just proportion, and they are entitled to be reimbursed. If the stock held by the defendant has been forfeited as alleged, he has none to offer as a set-off against the notes in suit.

From the Wells Circuit Court.

C. W. Watkins, A. N. Martin, E. C. Vaughn, E. E. Kelsey and J. M. Hatfield, for appellants.

J. B. Kenna, for appellee.

COFFEY, J.—This was an action by the appellee against the appellants to foreclose three several mortgages executed upon certain described real estate to secure the payment of the promissory notes therein described.

The complaint consists of three paragraphs, the first being based upon a promissory note of the following tenor:

“HUNTINGTON, INDIANA, March 27th, 1885.

“For value received I promise to pay to the Huntington City Building, Loan and Savings Association of Huntington, Indiana, the sum of four hundred dollars eight years after the date of incorporation of said association, viz.: August 10th, 1882, or whenever said association shall be

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declared by its Board of Directors legally ended, with interest at the rate of six per cent. per annum on the sum of four hundred dollars, together with dues, fines, assessments and premiums of one hundred and forty dollars bid by me for precedence in taking this loan on shares of stock, payable in equal monthly instalments on the first Saturday of each month; this obligation is given for money loaned under the constitution, by-laws and regulations of said association, which constitution, by-laws and regulations are hereby made a part of this note; and I do further promise and agree that should the monthly instalments of interest or premium hereon as aforesaid remain due and unpaid for three months, or should my stock in said association be forfeited for the non-payment of instalments of dues, or premium or for any fines or assessments thereon for current expenses as provided by said constitution and by-laws, or should I fail to pay any taxes, ground rent or fire insurance premium on the property mortgaged to said association to secure the payment of this note for three months after the same becomes due, then, and in either case, the whole amount of principal, four hundred dollars, unpaid interest with all ground rents, fire insurance premiums and taxes paid or advanced by said association on said mortgaged premises with attorney's fees shall become immediately due and collectible; but in case said interest, dues, premiums, fines, assessments, ground rent, fire insurance premiums and taxes shall have been paid as aforesaid, then the principal of this obligation shall become due when the value of the assets of said association shall be sufficient to divide to each share of stock the sum of two hundred dollars or its equivalent, and the said principal shall then be paid by applying a sufficient amount of the stock owned by the undersigned to the payment of said principal, and thereupon the undersigned shall cease to have any inter-

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est in any stock so applied; all without relief from valuation or appraisement laws.

[Signed.]

JAS. M. HATFIELD."

It is alleged in the complaint that the appellee is a corporation duly organized under the laws of the State of Indiana; that the appellant James M. Hatfield owned twelve shares of the capital stock of the appellee, of the par value of two hundred dollars each; that under the constitution and by-laws of the appellee the appellant was required to pay one dollar and fifty cents on each share of stock so owned by him on the first Saturday of each month until each share of said stock should be of the cash value of two hundred dollars; that on the 27th day of March, 1885, the appellant James M. Hatfield borrowed of the appellee the sum of four hundred dollars at six per cent. interest and executed the note above set out to secure the payment of the same; that the appellee was incorporated on the 10th day of August, 1882, and that said note is due and unpaid, and that the Board of Directors of the appellee has never declared the association legally ended; that said shares of stock have never become of the value of two hundred dollars each; that before the expiration of eight years from the date of the incorporation of said association and before said note became due the appellant James M. Hatfield became indebted to the appellee in the sum of one hundred and eighty-three dollars for dues and in the sum of one hundred and twenty-one dollars and thirteen cents for interest on said note, and in the further sum of one hundred and thirty-two dollars and ninety-five cents for premium on said loan; that for more than three months prior to the expiration of said eight years from the date of the incorporation of the appellee the appellant was delinquent in the above amounts, which he has refused and failed to pay; that by reason thereof the stock so held by the appellant has been forfeited, and said note has become due.

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Following these allegations it is alleged that both the appellants executed the mortgage set up with this paragraph of the complaint to secure the payment of the note.

The second and third paragraphs of the complaint are each based upon separate promissory notes of one thousand dollars each, similar to the note above set out, for loaned money, and contain substantially the same allegations as those contained in the first paragraph of the complaint.

The appellants filed separate answers to this complaint. The answer of James M. Hatfield consists of five paragraphs, the first being a general denial.

The second avers, in substance, that the appellee should not recover in this action for the reason that it was organized under the laws of the State of Indiana providing for the organization of Building, Loan and Saving Associations; that but one series of its capital stock, consisting of five hundred shares, was ever issued, and that all of said shares of stock have been retired in accordance with the law governing such associations, and that there are no debts due from the appellee to any one.

The third paragraph is the same as the second, except that it admits the attorney's fees and costs in this action, and prays the court to ascertain the amount of such fees and costs.

The fourth paragraph is the same, with the addition that it sets out the constitution and by-laws of the appellee and avers that all the stock has either been retired or forfeited, and seeks to set off the stock issued to the appellant against the notes in suit.

The fifth paragraph is substantially the same as the fourth.

The separate answer of the appellant Thursy J. Hatfield consists of three paragraphs, the first being the general denial.

The second paragraph is the same, in substance, as the

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second paragraph of her co-appellant, and the third is the same as fourth and fifth paragraphs.

To these several affirmative answers the circuit court sustained a demurrer.

The assignment of error calls in question the propriety of the ruling of the circuit court in overruling a demurrer to each paragraph of the complaint, and in sustaining a demurrer to the several affirmative answers above referred to in this opinion.

It is contended by the appellants that the complaint is not sufficient to withstand a demurrer because it does not refer to the constitution and by-laws of the appellee filed therewith.

This objection is not, in our opinion, tenable. By the express terms of the note the constitution and by-laws are made a part of it. The note and the constitution and by-laws of the appellee constitute but one instrument. Such constitution and by-laws constitute a part of each note in suit, and as a copy of each was filed with the complaint we think it was sufficient to refer to them as the note. By an examination of the copy of the notes in connection with the copy of the constitution and by-laws filed no one could fail to observe that the two constituted only one instrument to be considered and construed as a whole. One copy was sufficient. *Scotton v. Randolph*, 96 Ind. 581.

Nor do we think it was necessary to allege that the appellee had filed the written acceptance provided for by section 854, Elliott's Supplement. It is evident from the reading of the entire act, of which that section constitutes a part, that it was not the intention of the General Assembly to dissolve or abolish existing building and loan associations, or to deprive them of any of the rights they possessed under the laws then in existence. It was its purpose to enlarge rather than to restrict their powers and privileges.

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In our opinion each paragraph of the complaint was sufficient to repel a demurrer.

We are of the opinion that neither of the special answers involved in this case was sufficient to bar the appellee's right of recovery. They each admit that the appellant James M. Hatfield has in his possession twenty-four hundred dollars of the money of the appellee with the accumulated interest thereon. It is not averred that he has paid the weekly instalments due on the stock held by him to keep it alive. Under these circumstances the fact that the appellee has retired the outstanding valid stock furnishes no legal excuse for a failure on the part of the appellee to refund the money borrowed. If his stock has been forfeited for non-payment of dues he no longer has any interest in the assets of the association. Such assets belong to those who kept their stock alive by the payment of their dues, and for the purpose of distributing such assets the appellee has the right to collect and convert them into cash. If sufficient funds have been paid to retire the unforfeited stock, while the appellant has failed and neglected to pay the assessment due from him, those who paid contributed more than their just proportion, and they are entitled to be reimbursed. If the stock held by the appellant has been forfeited, as alleged, he has none to offer as a set-off against the notes in suit. It would be inequitable to permit the appellant to withhold the money which his answers admit to be due the appellee for the sole reason that the stock has been retired, while there are members of the corporation entitled to share in its distribution. For these reasons, among others, we are of the opinion that the circuit court did not err in sustaining a demurrer to the several affirmative answers filed by the appellants in this cause.

Judgment affirmed.

Filed June 8, 1892; petition for a rehearing overruled Sept. 14, 1892.

No. 15,859.

BALL v. BALL.

MORTGAGE.—Foreclosure.—Action to Redeem.—Counter-Claim.—Demurrer.
—In an action to redeem a tract of land, sold upon a foreclosure of a mortgage, and for an accounting and a judgment for rents received by the appellee while in possession of the land the appellant can not complain of the action of the court in overruling a demurrer to a counter-claim filed by the appellee, the court having found against the appellant in his action to recover the land or redeem it from sale, and in favor of the appellee upon the issues joined involving its ownership.

From the Tippecanoe Circuit Court.

J. B. Sherwood, for appellant.

A. L. Kumler and *T. F. Gaylord*, for appellee.

MILLER, J.—The appellant brought this action against the appellee to redeem a tract of real estate that had been sold upon a foreclosure of a mortgage, and to quiet his title against the adverse claims of the appellee.

The appellee answered the complaint by a general denial and other answers.

The cause was tried by a master commissioner, who found the facts and returned conclusions of law from the facts; upon which finding the court rendered a judgment against the appellant, adjudging and decreeing that he was not entitled to redeem the land, and quieting the title thereto as against the adverse claims of the appellee.

Several errors are assigned, but only one of them is discussed by appellant's counsel in his brief, all others being thereby waived.

The second assignment of error calls in question the ruling of the court in overruling the demurrer of the appellant to the counter-claim filed by the appellee.

The pleading was addressed to so much of the complaint as asked for an accounting and a judgment for rents received by the appellee while in possession of the land.

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The court having found against the appellant in his action to recover the land or redeem it from sale, and in favor of the appellee upon the issues joined involving its ownership, the appellant was not harmed by this ruling.

If the court had found in favor of the appellant, in the main issue, and an accounting had been had of the rents and profits received, and expenditure made, the issue tendered by the counter-claim would have been an important one, and an adverse ruling upon its sufficiency to withstand a demurrer would have been reversible error.

Where it affirmatively appears that a ruling upon a demurrer to a pleading has not harmed the appellant, we will not examine, or pass upon its sufficiency. *Miller v. Hardy*, 131 Ind. 13.

Judgment affirmed.

Filed May 21, 1892; petition for a rehearing overruled Nov. 22, 1892.

No. 16,296.

WEHRS v. THE STATE.

DEPOSITION.—*When May be Taken.*—*Who Determines.*—*Refusal of Witness to Submit to Examination.*—*Contempt.*—The deposition of a witness may be taken under the terms of our statute, although a state of facts does not exist at the time that would render the deposition admissible in evidence. The question as to whether a cause for taking a deposition exists is for the party who seeks to take it, and a witness may be punished for contempt for his refusal to submit to the examination. The statutes of the State do not enumerate any causes for taking depositions, but simply provide for the causes in which they may be read. See sections 423 and 432, R. S. 1881.

From the Allen Superior Court.

A. Zollars and B. T. Calvert, for appellant.

W. G. Colerick and H. Colerick, for the State.

COFFEY, J.—On the 1st day of June, 1891, Phillip Miller instituted suit in the Allen County Superior Court against

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the Pennsylvania Company, seeking to recover damages on account of a personal injury received by him while employed as a laborer in the shops of the company. He sought to take the deposition of the appellant, and other witnesses, to be used on the trial of such action, and for that purpose served upon the solicitor of the company a notice that he would, at a given time and place, proceed to take such depositions.

On the day named the appellant appeared as a witness, with others, and the company also appeared by its attorney. Miller having propounded questions to the witnesses present calculated to elicit evidence material to the issues in his suit against the company, the company, by its attorney, objected to the witnesses answering, upon the ground that Miller had no right, at the time and in the manner attempted, to take the depositions of such witnesses, instructed them not to answer, and under such instructions the witnesses refused to answer the questions propounded to them.

Upon such refusal the notary public, before whom it was sought to take the depositions, reported the fact to the court in which the case was pending, and in answer to a rule to show cause why they should not appear and give their depositions, the appellant, and others, appeared and filed an affidavit showing, among other things, that he was a married man, residing in his own property, with his family, in the city of Fort Wayne, with no intention or purpose of leaving the city either permanently or temporarily; that at the time of the injuries set up in the complaint he was, and still is, in the employ of the Pennsylvania Company, working in its shops at the city of Fort Wayne; that he had been informed by the attorney for that company that he would be called and used by it as a witness on a trial of the cause between it and Miller; that he was in good health, had never been sick, was only thirty-two years old, and was not likely to get sick before the cause could be tried; that he had not been threatening to, and would not make any effort to avoid the pro-

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cess of the court requiring him to be present as a witness at the trial of said cause, but, on the contrary, would appear at the trial and testify to the truth as he understood it; that he had been informed and believed that if his deposition was taken it could not be used on the trial; that he was informed, and had good reason to believe, that Miller was endeavoring to take his deposition, not for the purpose of using it as evidence on the trial of the cause, but simply for the purpose of discovering, in advance, what the testimony of the company would be on the trial of the cause.

In answer to this statement Miller filed an affidavit in which he stated that the witnesses whose depositions he sought were the only witnesses to his injury, except one Craig, who had left the State, and whose residence was then unknown to him; that he was seeking to take their depositions in order to secure the production of their evidence in his cause, and for the purpose of securing justice on the trial.

The court entered an order requiring the appellant, and the other witnesses, to appear at a time and place named, and give their depositions. With this order the appellant refused to comply, for which disobedience he was fined and imprisoned by the court. By this appeal he seeks to reverse the judgment of the court in thus punishing him as for a contempt.

His position, briefly stated, is that, inasmuch, as there existed no state of facts at the time Miller sought to take his deposition which would authorize him to read it when taken, he was not bound to submit to an examination; in other words, that a deposition can not be taken, under the terms of our statute, unless such a state of facts exists, at the time, as would render the deposition admissible in evidence. This question involves the construction of our statutes upon the subject of taking and reading depositions in evidence on the trial of causes in the courts of this State.

Section 423, R. S. 1881, provides that "In all actions, dep-

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ositions may be taken by either party, in vacation or term-time, at any time after service of summons, without order of court therefor. They may be used in the trial of all issues, in any action, in the following cases:

"First. Where the witness does not reside in the county, or in a county adjoining the one in which the trial is to be held, or is absent from the State.

"Second. When the deponent is so aged, infirm, or sick as not to be able to attend the court or other place of trial, or is dead.

"Third. When the depositions have been taken by agreement of parties, or by the order of the court trying the cause.

"Fourth. When the deponent is a State or county officer, or a judge, or a practicing physician, or attorney-at-law, and the trial is to be held in any county in which the deponent does not reside. In either of the foregoing cases the attendance of the witness can not be enforced.

"Fifth. When notice is given fixing the time of taking any deposition on a day in term time, the court may, if in session, or the judge thereof in vacation, on notice given by the adverse party of the time and place of hearing the motion, fix another day for such taking, and the court on the hearing of such motion, may fix the time for such taking, from which there shall be no appeal."

Section 432 provides that "When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that the cause for taking and reading it still exists."

Section 265, R. S. 1843, p. 720, made the causes for using depositions, under our present statute, the causes for taking such depositions, but the revision of 1852 (2 R. S., section 271, p. 89) failed to enumerate any causes for taking depositions, but did provide for the causes in which they might be read when taken. 2 R. S. 1876, p. 140, section 432, *supra*, is copied from the revision of 1852.

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If section 423, *supra*, stood alone, the question we are now considering would be free from difficulty, but it is contended that it must be construed in connection with section 432, and when so construed it does not authorize the taking of a deposition unless a state of facts exists at the time which would enable the party taking it to read it in evidence.

In the case of *Griffin v. Templeton*, 17 Ind. 234, *Haun v. Wilson*, 28 Ind. 296, and *Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143, cited by appellant, the question here was not presented to the court for consideration, and they are not, for that reason, to be regarded as authorities in point.

The case of *Hazlett v. Gambold*, 15 Ind. 303, would seem to be more nearly in point. In that case the witness, whose depositions were offered in evidence, resided in an adjoining county. Over the objections of the appellants they were read in evidence without proof that such witness came within any of the cases fixed by statute authorizing their depositions to be read. In reversing the judgment for this reason the court said: "Assuming that the objection to the depositions was made at the proper time, the ruling of the court can not be maintained; because the statute, though it allows depositions to be taken 'in all actions,' does not allow them to be read in evidence in any case, other than those which it points out."

As no cause for taking depositions is specified in the statute, it is reasonable to presume that the Legislature did not think any litigant would be willing to incur the cost and trouble of taking testimony in that mode without some reason existing for so doing. The fact that a party had instituted suit in court and served his adversary with process was, doubtless, thought to be a sufficient guaranty that he was taking testimony in good faith when taking depositions relating to the matter in controversy. It is, perhaps, true that depositions are seldom taken unless a state of facts exists which would enable the party taking them to use them

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in evidence upon the trial of the cause, and the existence of such facts is, generally, the moving cause which prompts a party to the suit to incur the expense which such a course entails. When taken because such a state of facts exists, before they can be read it must be shown to the satisfaction of the court that such cause still exists at the time of the trial. If taken because the witness is sick, a county or State officer, a practicing physician or attorney, it must be shown before they can be read that the cause for taking and reading still exists, but it does not follow that a party taking depositions can not read them because the facts do not exist, at the time they were taken, which would enable him to read them. If a party to a suit should take the deposition of a witness in good health, residing in the county where the trial was to be had, and such witness should die or become insane before the trial, we do not think his adversary could prevent the reading of the deposition by proof that no state of facts existed at the time it was taken which would render it admissible in evidence. It would be sufficient, we think, to satisfy the court at the time of trial that the witness was dead, or had, since the taking of the depositions, become insane. The state of facts existing at the time the deposition was taken would be wholly immaterial.

The construction contended for by the appellant, if adopted, would, we think, lead to the utmost confusion.

Depositions are often taken when no court is in session. As they are taken, under our statute, without any order of court therefor, who would determine the necessity for so doing? Is it a question for the witness to determine, or for the officer before whom they are to be taken? If it is a question for the witness, an unwilling witness would generally decide that no cause for taking his deposition existed, and would refuse to submit to an examination. We think the question as to whether a cause for taking depositions exists is for the party who seeks to take them, just as he determines the necessity for subpoenaing witnesses to attend

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court on the trial of his cause. If it be said that the right is liable to abuse, it may be answered that it is no more liable to abuse than the right to subpoena and compel the attendance of witnesses at court. They are both subject to abuse, but under present legislation there is no remedy for it except to tax the party who abuses such privilege with the unnecessary costs he makes.

In our opinion Miller had the legal right to take the deposition of the appellant, and for that reason the court did not err in punishing him for his refusal to submit to examination.

Judgment affirmed.

Filed Sept. 13, 1892.

No. 15,904.

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WILL.—*Construction of.*—*Specific Legacies.*—*Charge Upon Real Estate.*—

Where a testator made various bequests of money, and then, by the terms of the will, gave to his son and daughter "all the balance or residue of his estate, real and personal," and after the payment of the testator's debts and the costs of administration there was not sufficient personal estate left to pay the bequests, they became a charge on the real estate, as it was not specifically devised, but merely included in the residuary clause.

SAME.—*Sale of Land to Pay.*—*Specific Legacies.*—*Duty of Administrator to Sell.*

—It is the duty of an administrator with the will annexed to pay specific bequests, and if they are a charge upon or a lien against the real estate, and it becomes necessary to sell the real estate for the purpose of paying them, it is his duty to do so.

From the Perry Circuit Court.

W. Henning, A. Gilchrist and C. A. De Bruler, for appellant.

E. E. Summit, for appellee.

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OLDS, J.—Peter Short died testate. By his last will he bequeathed to a granddaughter \$200, to a grandson \$300, to another granddaughter \$300, to another grandson \$200, and to his daughter Theresa \$1. Following these bequests of stipulated amounts the will contains a residuary clause giving and bequeathing to his son, Peter Short, Jr., and his daughter, Mary Ann Galluly, “all the balance or residue of his estate, real and personal, wherever situate, in equal parts, share and share alike.” Further provision is made that should the legatees to whom the legacies were given die before arriving at full age, the sums so bequeathed to them should go to the residuary legatees.

The appellee was duly appointed administrator of the estate with the will annexed, and files his petition in this case for the sale of the real estate. The appellant was made a party, it being alleged in the petition that it claimed some interest in the real estate.

The facts stated in the petition show the amount of the bequests, the costs of the administration, the amount of the indebtedness owing by the estate, showing that the debts and costs of administration amount to \$402.57, legacies \$1,001, making a total of \$1,403.57, and that the personal estate amounted to \$1,092.20, leaving a deficiency of \$311.37 in the personal estate to pay legacies, debts and costs of administration.

There was a trial and finding for the appellee, and an order for the sale of the real estate.

The question presented is, there being sufficient personal estate to pay the debts and costs of administration, but not sufficient to pay the \$1,001 bequests, can the real estate be sold to make assets with which to pay the same?

It is a well settled doctrine that a will must be so interpreted as to give effect to the intention of the testator. It is clearly apparent from the will in this case that it was the intention of the testator to dispose of his entire estate, both real and personal, in a like manner, treating all as a com-

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mon fund, first taking from it certain specific amounts as bequests to his four grandchildren, then giving to his son and daughter "the balance or residue of his estate, real and personal." There is no specific devise of any real estate, but a disposition of the residue of his estate, both real and personal. The intention of the testator is clear that he intended to take from his estate, real and personal, certain bequests, and then dispose of the amount remaining, whether it be real or personal or both, to the residuary legatees named. Giving the will this construction, it makes the specific legacies a charge on the real estate, or in other words, makes the real estate liable for the payment of such bequests. The language of the will is equivalent to saying that he gave to the son and daughter all of his real and personal estate not hereinbefore disposed of or not required for the payment of the bequests hereinbefore made.

In 3 Jarman on Wills (5th Am. Ed., p. 426), it is said: "It is also clear that where legacies are given and then all of the residue of the real and personal estate the legacies are charged on the realty."

It is further contended on the part of the appellant that even if the legacies are a charge on the real estate there is no authority for the administrator with the will annexed to make sale of the real estate for the payment of the legacies; there being sufficient assets arising from the sale of personal property and costs of administration, that the administrator has no authority to sell to realize a fund to pay off the legacies.

In *Gould v. Steyer*, 75 Ind. 50, it is held that "The proper person to pay a legacy is the executor, or the administrator with the will annexed. For a failure to pay it he may be sued on his bond."

This undoubtedly enunciates the proper theory. The testator provides that certain named amounts shall be paid out of his estate to certain named persons. The purpose of the appointment of an executor or administrator is to make set-

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tlement of the estate, to convert the assets into money and pay the liabilities and make settlement. If the executor or administrator is required to pay a legacy that is payable from the proceeds of the personal estate, it should likewise be his duty to pay one which was a charge against or lien upon the real estate, although he had to realize a portion or all of the money necessary to pay the same from the proceeds of real estate.

Section 2332, R. S. 1881, provides for the sale of the real estate for the payment of the liabilities of the estate, when the personal estate shall be insufficient, and, by section 2336, it is made the duty of the executor and administrator to file a petition for the sale of the real estate to make assets for the payment of the liabilities, as soon as he shall discover the personal estate is insufficient; and section 2378 provides for the payment of legacies, and the order in which they shall be paid.

In the case of *Davidson v. Coon*, 125 Ind. 497, the will gave to one son of the testator \$800, and to another \$300, to be made out of the testator's estate, and then provided that when said amounts shall have been paid, the remainder of his whole estate should be divided among his heirs, and it was held that the whole estate was charged with the payment of the legacies, and that the heirs, taking by the residuary clause in the will, acquired their interest subject to the legacies charged upon the land, and that the legatees had a right to establish against the land, the equitable lien created by the will. There is no distinction in principle between that case and the one at bar, notwithstanding the use of the words to be made out of the testator's estate, for it is evident by the terms of the will that the testator intended to charge his whole estate with the payment of the legacies, as there is no specific devise of any real estate to the residuary legatees or devisees. They are given the remainder of his real and personal estate. By the language of the will, in the residuary clause, it is, we think, clearly apparent that

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the testator intended to treat his estate as a whole, first disposing of certain stipulated amounts to his grandchildren, and giving what remained of both the real and personal estate to his son and daughter, and the whole estate is charged with the payment of the \$1,001 in legacies, and by the will an equitable lien on the land is created securing the payment of the legacies. It was the duty of the administrator to pay these legacies, and, the personal property being insufficient, it was his duty to sell the real estate, though if the administrator had made settlement of the estate, and failed to sell the real estate and pay them, the legatees would have a right to enforce the lien as held in the case of *Davidson v. Coon*, *supra*.

The doctrine we have announced is not in conflict with the general rule, that the personal property supplies the fund out of which legacies are to be paid, and when a specific devise of land is made, and a general legacy is bequeathed, without charging the legacy upon the land devised, that it is incumbent on the legatee, or person enforcing the lien, to show that the testator had no personal estate at the time the will was executed, out of which the legacy could be paid, for in this case the testator classed his estate, real and personal, as a whole, first bequeathing certain legacies, and then disposing of the remainder of his estate, real and personal, to certain persons by a residuary clause in the will. By the terms of the will, the legacies were made a charge on the real estate, creating an equitable lien thereon, and were such a liability as authorized the sale of the real estate for their payment, the persons named in the residuary clause taking such portion of the estate, real and personal, only as remained after the payment of the legacies previously bequeathed.

We think there is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Sept. 13, 1892.

The Lake Erie and Western Railroad Company v. Mugg, Administrator.

No. 15,268.

**THE LAKE ERIE AND WESTERN RAILROAD COMPANY v.
MUGG, ADMINISTRATOR.**

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RAILROAD.—Action for Death of Employee.—Knowledge of Defective Rail.—Complaint.—Contributory Negligence.—In an action against a railroad company for damages for the death of a switchman, a complaint is not demurrable on the ground that it shows the deceased to have been guilty of contributory negligence, when it avers that his death was occasioned by a defective rail, the defects consisting of a sliver which extended outward and along the outside of the rail; that while going to couple two cars, one of which was in motion, he stepped on the sliver and was held fast until run over by the moving car; that the injury was caused by the fault and negligence of the defendant, and that the deceased had no knowledge of the defective condition of the rail or existence of the sliver, and that the injury was caused without any fault or negligence on his part. The fact that he did not, while engaged in making the coupling, see the sliver, can not, of itself, raise a presumption of contributory negligence on his part; nor, as against the averments of want of knowledge on his part, can it be determined that he must have known, or should have known, of the defective condition of the track.

SAME.—Evidence.—Rules of the Company.—In such action, it was not error for the court to refuse to permit the defendant to introduce in evidence certain rules and regulations of the company for the guidance of its employees in the discharge of their duties, no offer being made by the defendant to show a violation by the deceased of any of such rules.

SAME.—Proof that Deceased Gave His Wages to His Wife.—It was not error to permit the plaintiff to prove that the deceased had been in the habit of turning his wages over to his wife, and permitting the same to be expended for the support of his family. This evidence was competent to show the loss sustained by his family because of his death.

SAME.—Experiments Made by Witness.—Exclusion of.—Where evidence was given on the trial of statements made by the deceased, that at the time of the injury his boot froze to the rail, and he was unable to pull it away, the court properly refused to permit a witness to testify that, after the statements were made in his hearing, by the deceased, he experimented and found that the weather had the same effect on his boot, it not being shown that the experiment was made under the same conditions that existed when the injury took place.

SAME.—Expert Testimony.—Where the defendant produced a witness, who gave expert evidence upon the result of an examination of the heel of the boot worn by the deceased at the time of the accident, it was proper

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for the court to permit the plaintiff to introduce a shoemaker as a witness in rebuttal on this question.

SAME.—Measure of Damages.—Loss of Support and Maintenance.—The plaintiff was entitled to recover the damages suffered by the loss of the support and maintenance of the widow and minor children of the deceased, in addition to any prospective accumulation of property.

MASTER AND SERVANT.—Defective Machinery.—Proof of Custom.—Ordinarily a master will not be permitted to show as a defence to an action by an employee for not furnishing reasonably safe and suitable machinery, or a reasonably safe place for his employees to work, that it was the general or universal custom of other masters to furnish defective implements or an unsafe place to work.

PRACTICE.—Affirmative Answer.—Refusal to Permit to File.—When not Error.—Where the court refused to permit the defendant to file an affirmative answer, after the issues had been closed, but all the matters set forth in the answer proposed to be filed were given in evidence and embraced in the verdict, it affirmatively appears that the defendant was not injured by the ruling.

SAME.—Independent Paper Filed with Transcript.—Supreme Court will not Consider.—A sworn copy of the opinion of the trial court, giving its reasons for overruling the motion for a new trial, taken down by a stenographer and filed as an independent paper with the transcript, will not be considered by the Supreme Court on appeal.

From the Tippecanoe Circuit Court.

W. E. Hackedorn, J. R. Coffroth, T. A. Stuart and F. W. Chase, for appellant.

J. F. McHugh, A. L. Kumler, B. W. Langdon and T. F. Gaylord, for appellee.

MILLER, J.—This was an action by the appellee against the appellant for the alleged wrongful killing of her intestate. Issue upon a general denial of the complaint, trial by jury, verdict for the appellee, and judgment upon the verdict.

The complaint charges that the plaintiff's intestate, William Mugg, was in the employ of the defendant as a yard switchman, and that a part of his duties was the coupling and uncoupling of cars in its yards; that on and before the 22d day of January, 1888, there was, in a side-track, where the intestate was engaged, a defective, unsafe, in-

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sufficient and dangerous rail, caused by there being a strong and sharp piece of rail called a sliver, which extended outward and along the outside of the rail; that the "defectiveness, unsafeness, insufficiency and dangerousness of said rail, and the existence of said piece of rail, or sliver, as aforesaid, was known to the defendant at and before the 22d day of January, 1888, or might have been known by it, by the exercise of proper care; and that the existence or presence of the piece of said rail or sliver was not known by the said decedent prior to the 22d day of January, 1888, nor before the time of the reception of the injuries by said decedent as herein described."

"The plaintiff further says that on the 22d day of January, 1888, the said decedent was engaged in the discharge of his said duties of yard switchman on said side-track, and that there were, then and there, two cars to be coupled; that one of said cars was stationary, and the other was in motion and approaching said stationary car for the purpose of permitting the coupling of the same to be made by the said decedent; that the decedent, to make said coupling of said cars, had to approach and was approaching the draw-head of said stationary car from the outside of the rail having said sliver, and at a point where said sliver was as aforesaid, and while approaching said draw-head, as aforesaid, the decedent was moving his foot across said rail without any negligence on his part, and while moving his said foot across said rail, as aforesaid, the said sliver caught and became fastened in the heel of the shoe or boot then and there on the decedent's said foot, without any fault of the said decedent, and in such wise that the foot of the decedent was on said rail, and the decedent could not, without any fault on his part, withdraw said foot from said rail, or his said foot from said boot on said rail, as aforesaid; that, while said foot was so fastened and held as aforesaid, said car, moving and approaching said stationary car as aforesaid, did approach, and the wheels of said moving car did then and there, without any fault of the dece-

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dent, run on and over the said foot and leg of said decedent, and thereby broke and mashed the same, and other injuries were then and there and thereby received by said decedent without any fault on his part; that afterwards, on the—day of January, 1888, the said William C. Mugg died from said injuries; that said decedent received said injuries and died without any fault on his part, and through the negligence of the defendant.”

The action of the court in overruling a demurrer to this complaint is assigned as error.

The objection urged to the complaint is, the claim that it shows that the deceased had the same means of knowing of the existence of the defect in the rail that the appellant had; that all he had to do was to have opened his eyes to have seen the defect.

We are satisfied that the allegations of the complaint, charging that the injury was caused by the fault and negligence of the defendant, and that the plaintiff's intestate had no knowledge of the defective condition of the rail, or existence of the sliver, and that the injury was caused without any fault or negligence on his part, are sufficient to repel a demurrer. The fact that he did not, while engaged in making a coupling, see the sliver can not, of itself, raise a presumption of contributory negligence on his part. Nor as against the averment of want of knowledge on his part, can it be determined that he must have known, or should have known, of the defective condition of the track. The duty of track inspection was not, primarily, one of his duties.

The objections urged to this complaint were so fully discussed in the well considered case of *Ohio, etc., R. W. Co. v. Percy*, 128 Ind. 197, that we deem it unnecessary to extend this opinion by a re-examination of the question. To the same effect see *Pennsylvania Co. v. Horton*, *post*, p. 189; *Louisville, etc., R. W. Co. v. Hanning*, 131 Ind. 528.

Application was made to the court, after the issues had been closed, for permission to file an affirmative answer,

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which was refused; after the refusal, the appellant asked permission to file it as a matter of right.

We do not find it necessary to review the ruling made by the court in refusing to open up the issues, for the reason that the evidence, which is in the record, and the special verdict returned by the jury, show that the matters, set forth in the answer proposed to be filed, were given in evidence, and embraced in the verdict, and it, therefore, appears, affirmatively, that the appellant was not injured by the ruling. *Miller v. Hardy*, 131 Ind. 13; *Ball v. Ball*, ante, p. 156; *State v. Vogel*, 117 Ind. 188.

Over seventy causes for a new trial were assigned in appellant's motion, the overruling of which is assigned as error in this court. Considerations of time and space will prevent an examination in this opinion of each of them in detail.

It is insisted, with unusual zeal and earnestness, that the special verdict of the jury, in many of its essential details, is not only against the weight of evidence, but that there is no evidence sufficient "even under the hard rule of this court," to warrant an affirmance of the judgment.

We have studied the evidence with care, but are unable to agree with counsel in this assumption.

In passing upon this question, we can not consider the sworn copy of the opinion of the court, giving his reasons for overruling the motion for a new trial, taken down by a stenographer, and filed as an independent paper with the transcript.

Appeals in this court are tried by the record, duly authenticated by the clerk of the trial court, and by this alone. Elliott's Appellate Procedure, section 186.

The appellant offered in evidence certain rules and regulations promulgated by the company for the guidance of its employees in the discharge of their duties. In making the offer, the appellant proposed to follow this with other evidence to show that the deceased, Mugg, had actual notice of these rules and regulations.

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The appellee objected to the introduction of this evidence, and her objection was sustained by the court.

The only portion of these rules at all pertinent to the case is as follows :

“Coupling by hand is strictly prohibited in all cases where a stick can be used to guide the link or shackle ; and each yardmaster, switchman, brakeman, or other employee, who may be expected to couple cars, is required to provide himself, at all times, with a stick for that purpose.”

It is questionable if this evidence was at all pertinent to the case made by the appellee, the injury having been received while the deceased was approaching the car for the purpose of making the coupling, and not while engaged in that duty. However this may be, we are satisfied that the record fails to show that the evidence was pertinent to the case for another reason. It does not appear but that the deceased used a coupling stick in making the coupling, in strict accordance with the rules. There was an entire absence of evidence on this subject, and no offer was made by the appellant to show a violation by the deceased of any of the rules of the company.

Complaint is made of the ruling of the court in permitting the appellee to prove that the deceased had been in the habit of turning his wages over to his wife, and permitting the same to be expended for the support of his family.

We think this evidence was competent to show the loss sustained by his family because of his death. *Hudson v. Houser*, 123 Ind. 309 ; 2 Thompson Negligence, 1291 ; 1 Harris Damages by Corporations, section 338 ; *Pennsylvania R. R. Co. v. Adams*, 55 Pa. St. 499.

Some evidence was given on the trial of statements made by the deceased to the effect that at the time the injury occurred his boot froze to the rail, and he was unable to pull his foot away. The appellant offered to show by a witness, who was present when the statement was claimed to have been made, that he went from Mugg's house on the same day, and

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experimented, and found that the weather had the same effect on his boot. This evidence was excluded, and the ruling was assigned as a cause for a new trial.

Under some circumstances this class of evidence may be very satisfactory, but unless the experiments are shown to have been made under essentially the same conditions that existed in the case on trial, the tendency is to confuse and mislead rather than enlighten the jury. *Commonwealth v. Piper*, 120 Mass. 188; *Eidt v. Cutler*, 127 Mass. 522; *State v. Justus*, 11 Oregon, 178.

We are of the opinion that the appellant did not show that the experiment was made under the same conditions that existed when the injury took place. The time of day was different, and the conditions as to warmth and moisture of the boot exposed may not have been, probably were not, the same.

The court did not err in excluding this evidence.

The ruling of the court in excluding evidence offered by the appellant during the examination of Patrick Walson, Florence Sullivan and W. W. Wentz, assigned as causes for a new trial, Nos. 23, 24, 25, 26, 43, 44, 45, 46, 52, 53, are grouped together in appellant's brief with the statement that for the purpose of tending to prove that track in question was in reasonable good and safe condition, appellant offered to prove its condition by these witnesses, each of them being experienced railway roadmasters. The case of *Doyle v. St. Paul, etc., R. W. Co.*, 42 Minn. 79, is cited in support of the admissibility of the offered testimony. In that case the negligence, charged against the company, was, "that the defendant had placed a worn-out and splintered rail in this side track, and had allowed the same to remain there."

Evidence was adduced that the defendant had taken partially worn rails from its main track, and put them in the side track at the station where the injury occurred. The defendant then offered to prove that this was a general and universal custom of other railroads throughout the north-

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west. The proof was excluded. The court held that this was error.

It is apparent that this decision is based upon the peculiar wording of the complaint in charging negligent conduct on the part of the railway company, and is not an authority in a case like the one before us.

Ordinarily, a master will not be permitted to show, as a defence to an action by an employee for not furnishing reasonably safe and suitable machinery, or a reasonably safe place for its employees to work, that it was the general or universal custom of other masters to furnish defective implements, or an unsafe place to work. **Black Accidents**, section 37.

Some other rulings of the court, in passing upon the admissibility of evidence, were made causes for a new trial, but the rulings, although assigned as error, are waived for want of an argument in support of the assignment. We have, however, examined the record, and are of the opinion that the various rulings were not erroneous.

The appellant produced a witness on the trial, who gave expert evidence upon the result of an examination of the heel of the boot worn by the deceased at the time of the accident. The plaintiff, in rebuttal, placed a shoemaker upon the stand who gave evidence upon the same subject.

The competency of a witness to testify as an expert is a matter resting largely in the discretion of the trial court, with whose ruling appellate courts are slow to interfere. *City of Ft. Wayne v. Coombs*, 107 Ind. 75; *Rogers Expert Testimony*, section 22. We can not say that the court erred in the exercise of its discretion.

It is insisted that the damages are excessive. The case of *Howard v. Delaware, etc., Canal Co.*, 40 Fed. R. 195, cited by appellant, was an action brought for the benefit of collateral kindred not dependent upon the deceased for their support. The court held that there could only be a recovery for the loss of what the deceased would probably have

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accumulated afterwards, if he had lived, and as he had accumulated nothing up to the time of his death, in middle life, the recovery could only be for nominal damages.

The distinction between that case and the one in hand is obvious.

In this the appellee was entitled to recover the damages suffered by the loss of the support and maintenance of the widow and minor children of the deceased, in addition to any prospective accumulation of property.

Judgment affirmed.

iled June 10, 1892; petition for a rehearing overruled Sept. 15, 1892.

COFFEY, J., dissents.

No. 14,508.

FALVEY v. JACKSON ET AL.

BILL OF EXCEPTIONS.—*When Original May be Certified by Clerk.*—Where the bill of exceptions is taken solely for the purpose of incorporating the stenographer's report of the evidence in the record, the original may be certified to this court by the clerk. This is the rule only where the purpose is that specified.

EVIDENCE.—*Motion to Strike Out.*—*When not Seasonably Made.*—A motion to strike out evidence is not seasonably made when it was not offered until after the close of the evidence, and there was nothing explaining or excusing the delay.

From the Vigo Circuit Court.

C. F. McNutt and *J. G. McNutt*, for appellant.

S. C. Stimson, *R. B. Stimson* and *A. M. Higgins*, for appellees.

ELLIOTT, J.—The appellees' counsel insist that, as the clerk has certified the original bill of exceptions instead of making a transcript of it, we can not consider it as part of

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the record. We can not assent to this view. The bill was taken for the purpose of getting the stenographer's long-hand report of the evidence into the record, and it contains only such statements as are germane to the evidence, and such formal recitals as were necessary to incorporate the stenographer's report in the record. The rule is that where the bill of exceptions is taken solely for the purpose of incorporating the stenographer's report in the record, the original may be certified to this court by the clerk. It is to be observed, however, that this is the rule only where the purpose is that specified; in all other cases, the clerk must make a transcript of the original bill of exceptions. See authorities cited in Elliott App. Proc., section 822, note.

It is contended by the appellees that the specification in the motion for a new trial, based upon the overruling of a motion made by the appellant to strike out the testimony of certain witnesses, is ineffective, for the reason that it does not appear that the motion to strike out was seasonably made. This contention must be sustained. The record as it comes to us does not clearly show when the motion was made, but indicates that it was not made until the bill of exceptions was presented for signature. It does not, at all events, affirmatively show that it was made before the finding of the court was announced. Courts do not regard with favor motions to strike out evidence unless promptly made, for they are not willing to allow parties to take the chances of favorable responses to questions from the witnesses, and if disappointed, then move to strike out. In the case before us, it is quite clear that the record does not show such promptness in moving to strike out as the rule requires. Many of the courts hold that a motion to strike out evidence is one of favor and not of right, except where a sufficient reason is shown for not objecting to the admission of the evidence. It is well agreed that the failure to promptly interpose such a motion is fatal. See authorities cited in El-

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liott App. Proc., section 772, note 2. In this instance the motion was not made at the proper time, for, going beyond the rule and giving the record the most favorable construction to the appellant, the motion appears not to have been made until after the close of the evidence, and this was too late, as there is nothing excusing or explaining the delay.

Judgment affirmed.

Filed June 7, 1892; petition for a rehearing overruled Sept. 15, 1892.

No. 15,824.

HUBBARD ET AL. v. MOORE.

MECHANIC'S LIEN.—*Action by Material Man.*—*Contractor Not a Necessary Party.*—The contractor is not a necessary party in an action by a material man to foreclose a mechanic's lien.

SAME.—*Filing of Lien.*—*Sufficiency of Complaint After Judgment.*—In an action to foreclose a mechanic's lien when the dates of the items in the bill of particulars show that some of the materials were furnished less than sixty days before the notice of the lien was filed, and the complaint contains a distinct averment that the notice was filed in less than sixty days after said materials were furnished, the complaint is sufficient after judgment.

SAME.—*Notice.*—*Materials Furnished After.*—*Lien.*—Under section 1692, Elliott's Supplement, a mechanic's lien can only be acquired for such materials as are furnished after the giving of such notice.

From the Howard Circuit Court.

J. C. Blacklidge, W. E. Blacklidge and B. C. Moon, for appellants.

J. E. Moore, for appellee.

OLDS, J.—The appellant Georgia Hubbard contracted with Waggaman to build her a dwelling-house on a lot owned by her in the city of Kokomo, Howard county, Indiana. The appellee, Samuel C. Moore, furnished materials to the con-

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tractor alleged to be of the value of \$1,000, which was used in the construction of said dwelling. The appellee, Moore, brings this action, alleging that the appellant Georgia Hubbard was the owner of the lot, that she contracted with one Waggaman for the building of the dwelling thereon; that Waggaman purchased the materials, the wood work, of the appellee of the value of \$1,000, which was furnished by him and used in the construction of the house; that appellee notified Mrs. Hubbard of the furnishing of the materials before they were furnished, and afterwards, and within sixty days from the furnishing of said materials, appellee filed a notice of his intention to hold a lien on said property for the amount of his claim in the recorder's office of said county, specifically setting forth the amount claimed and a description of the real estate, setting out a copy of the notice and making it a part of the complaint, and alleging that it was duly recorded; also setting out an itemized statement of the materials furnished; that the claim is due and unpaid, and the husband of the appellant Georgia Hubbard is made a party.

Appellants demurred to the complaint for the reason that there was a defect of parties defendant in not making Waggaman, the contractor, a party defendant, which demurrer was overruled, and the ruling is assigned as error. There is nothing in this objection to the complaint. Counsel for appellants concede that it has been decided in the case of the *City of Crawfordsville v. Barr*, 65 Ind. 367, that the contractor is not a necessary party, but they contend that that decision should be overruled, and that the contractor ought to be made a party. We see no good reason why we should depart from the rule laid down in the *City of Crawfordsville v. Barr*, *supra*. There is no relief sought against the contractor, and if there is any reason existing why in any case the contractor should be made a party, he may be made a party on proper showing.

Error is assigned that the complaint does not state facts

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sufficient to constitute a cause of action. The sufficiency of the complaint in this respect is first questioned by the assignment of error in this court.

It is contended that the averments of the complaint show that the appellee furnished the materials to the contractor August 29, 1889, and that the notice of the lien was filed in recorder's office on February 15, 1890, which was more than sixty days thereafter, but the dates of the items in the bill of particulars show that some of the materials were furnished less than sixty days before the notice of the lien was filed, and it is insisted that the averments of the complaint control, and therefore the complaint is defective. If this were all of the averments of the complaint, we think it would be sufficient to bar another action, and would be a defective averment and be cured by the verdict, or finding, a discrepancy in dates that might be supplied or corrected by the proof, but the complaint contains a distinct averment that the notice was filed in less than sixty days after said materials were furnished, and the complaint is clearly sufficient after judgment.

The next error assigned is the overruling of the motion of the appellant Georgia Hubbard for a new trial. It is alleged as causes for a new trial that the court erred in fixing the amount of the plaintiff's recovery in this, that the amount fixed by the court is too large, and that the damages assessed by the court in favor of the plaintiff are excessive.

There is a personal judgment rendered against the defendants and a foreclosure of the lien, but there is no motion to modify the judgment.

The only theory upon which there can be a recovery is upon the theory that there was a verbal notice given as required by section 1692, Elliott's Supp.

There was a written notice given, after the materials were furnished, as required by section 1696, Elliott's Supp., but there is no evidence that Mrs. Hubbard was indebted to the contractor, Waggaman, at the time the notice was given, at

Hubbard *et al.* v. Moore.

least not to exceed the amount of \$116, which amount she had paid to appellee, and he had accepted, before this suit was commenced, so that there would be no liability under that section.

As to Mrs. Hubbard's liability under section 1692, *supra*, under the most favorable construction to be given the evidence, the notice was not given until \$225 of the amount of materials furnished by appellee had been furnished and used in the building, and for such amount, under the recent decision of *Quaack v. Schmid*, 131 Ind. 185, the appellant Mrs. Hubbard would not be liable; but of that amount she accepted an order of Waggaman, drawn upon her, for \$100, and paid it, but there still remained of that amount \$125 for which she was not liable. If the notice was given at that time, as testified to by witnesses on behalf of the appellee, the appellee would have a lien upon the property for the amount of materials furnished after that date which he could enforce, but the court in this case allowed the full amount of the appellee's claim, and rendered a personal judgment and a decree of foreclosure of the lien.

In assessing appellee's damage at the full amount the court included \$125 which was not a lien upon the property, and for which Mrs. Hubbard was not liable. The damages assessed by the court were excessive to the amount of \$125, and the court erred in not sustaining Mrs. Hubbard's motion for a new trial.

If the appellee will enter a remittitur within thirty days from this date for \$125 of the judgment, the judgment will be affirmed, at his costs, and on failure to enter such remittitur the judgment will be reversed, at his costs.

Filed June 8, 1892.

The W. C. De Pauw Company v. Stubblefield.*

No. 15,579.

THE W. C. DE PAUW COMPANY v. STUBBLEFIELD. .

MASTER AND SERVANT.—*Safety of Place of Employment.—Duty of Master.—Assumption of Risk by Employee.—Contributory Negligence.*—A master is bound to take ordinary and reasonable care not to subject his servant to unreasonable and extraordinary dangers by sending him to work in dangerous buildings or premises. If he fails in his duty in this respect, by reason of which the servant is injured, such servant has a right of action against him, provided the injury occurred without the fault or negligence of the servant, and provided, further, that the risk of injury was not voluntarily assumed by the servant, with full knowledge of the danger, or competent means of such knowledge. For a state of facts showing a right of action in the plaintiff under this rule, see opinion.

NEGLIGENCE.—Contributory.—*When Proper to Submit Question of to Jury.*—When a state of facts and circumstances exists from which one sensible impartial man would infer that proper care had not been used, and that negligence existed, while another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence, the question of negligence must be referred to the jury under proper instructions from the court.

From the Floyd Circuit Court.

A. Dowling, for appellant.

J. V. Kelso, C. D. Kelso and J. K. Marsh, for appellee.

COFFEY, J.—This was an action by the appellee against the appellant, instituted in the Floyd Circuit Court, for the recovery of damages on account of a personal injury sustained by the appellee while acting as the employee of the appellant.

The appellant assigns as error in this court:

First. That the circuit court erred in overruling its demurrer to the appellee's complaint.

Second. That the court erred in overruling its motion for a new trial.

The complaint alleges, substantially, that the appellant is engaged in the manufacture of plate glass in the city of New Albany, where it owns and controls, for that purpose, ex-

132	182
140	656

132	182
148	63
151	602

132	182
160	152

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tensive buildings, warehouses, shops, machinery and other appliances, and grounds and yards upon which the same are situated; that on the 16th day of March, 1888, there was within the said shops and grounds and maintained by the appellant a ditch, trench or pit fourteen inches wide, three feet long and five feet deep, covered with a layer of boards seven-eighths of an inch thick, and two iron plates one-half inch thick each, called runner plates, adjacent to the boards, and which were not fastened down or made secure in any way; that on said day the appellee was in the employment of the appellant in and about its shops and premises as a laborer and in the proper discharge of his duties, under his employment, while he and seven other employees of the appellant were engaged in removing and transporting from one part of appellant's premises, near which said ditch was located, to another part of said premises, by means of a two-wheeled truck, a large casting, weighing two thousand two hundred pounds, the property of the appellant, used in said business, and while in the act of passing and crossing the said ditch or pit with said truck and casting thereon, the wheel of said truck, without any fault, carelessness or negligence on the part of the appellee or his fellow-workmen, or either of them, ran against and upon said runner plates and boards which were thereby knocked out of place, spread apart and broken down by the weight of said truck and casting, and said truck and casting precipitated and thrown into the ditch without any negligence on the part of the appellee or his fellow-workmen; that in falling, the casting, without any negligence on the part of the appellee, fell upon, mangled and crushed his foot and leg, rendering him a cripple for life; that the covering over the ditch or trench at the time appellee was so injured was, and for a long time prior thereto had been, insufficient, defective, unsafe and dangerous, in this, that it was not constructed of suitable material of sufficient strength to support the weight of the truck and casting, nor was it securely fastened down and

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held in place, but was constructed of unsuitable material and of insufficient strength, and so weak as to be incapable of supporting said truck and casting, all of which was well known to appellant long prior to the appellee's injury; that the appellee had no knowledge whatever of the dangerous condition of the ditch or pit, or of the character of the material of which the covering to the same was constructed, or that the covering was not securely fastened or held in place, nor could he have known of such danger by the exercise of ordinary care.

We think this complaint sufficient to withstand the demurrer levelled against it by the appellant.

It has long been the well recognized rule that the master is bound to take ordinary and reasonable care not to subject his servant to unreasonable and extraordinary dangers by sending him to work in dangerous buildings or premises. If he fails in his duty in this respect, by reason of which the servant is injured, such servant has a right of action against him, provided the injury occurred without the fault or negligence of the servant, and provided, further, that the risk of injury was not one voluntarily assumed by the servant, with full knowledge of the danger, or competent means of such knowledge. 2 Thompson Negligence, 972; *Indiana Car Co. v. Parker*, 100 Ind. 181.

It sufficiently appears from this complaint, we think, that the appellant failed in its duty in this respect in the case before us. It also sufficiently appears that the appellee was the servant of the appellant, and was injured in consequence of the appellant's negligence, without any fault or negligence on his part.

The court, in our opinion, did not err in overruling a demurrer to the complaint.

The only reason urged by the appellant for a new trial is that the evidence does not support the verdict of the jury.

The evidence on the part of the appellee, briefly stated, tended to show that the appellant was engaged in the manu-

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fracture of plate glass at the city of New Albany. In one of its buildings, used for that purpose, was a pit about fourteen inches wide and about three feet in length, formerly used in allowing a man to pass under the building for the purpose of greasing machinery. It had been abandoned for that purpose long before the injury for which this suit was brought, and had been covered with thin boards and two pieces of iron, each one-half inch thick, four and one-half inches wide, and about five feet in length. On the 16th day of March, 1888, the appellee, who was a minor, with several men, was engaged in removing a cog wheel, weighing something over two thousand pounds, from the machine shops to one of the appellant's buildings. In doing so they were compelled to pass over the pit above named. In attempting to cross the pit the irons slipped apart, being in no way secured or fastened, the plank gave way, and the iron bent under the weight of the cog wheel, by reason of which one wheel of the truck upon which it was being transported was precipitated into the pit, throwing the cog wheel upon the appellee's foot and ankle, injuring him severely.

He testified that he knew of the existence of the pit, but was ignorant of the fact that it was dangerous, not knowing that the iron with which it was covered was in no way fastened or secured.

Under these facts we think it was the proper course to submit to the jury, under proper instruction from the court, the question as to whether the appellant had been guilty of negligence resulting in the injury sustained by the appellee, as well as the question as to whether the appellee was free from contributory negligence. The rule is that where a state of facts and circumstances exists from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed, while another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence, the question of negligence must be referred to the jury under proper instruc-

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tions from the court. *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261; *Rogers v. Leyden*, 127 Ind. 50; *Baltimore, etc., R. R. Co. v. Walborn*, 127 Ind. 142.

There is no complaint of the instructions in this case. We must presume, therefore, that the question of negligence was referred to the jury under proper instructions for their guidance.

Under the well known rule of this court we have no power to disturb their finding on the weight of the evidence. The court did not err in overruling the appellant's motion for a new trial.

Judgment affirmed.

Filed Sept. 15, 1892.

 No. 15,671.

GROVES v. CULPH ET AL.

132	186
152	493
132	186
161	538
161	540
161	549

WILL.—Construction of.—Apparent Mistake.—Extrinsic Evidence.—Where one item of a will devised the house and lot on which the testator resided "being parts of lots number fifteen and sixteen," etc., to his wife during her natural life, and a subsequent item of the will devised "the same lot number fifteen so devised to my said wife during her lifetime" to the testator's youngest daughter, and "to her heirs in fee simple forever," there is such a mistake apparent on the face of the will as will permit the introduction of extrinsic evidence to show that the testator intended to devise the same property to his daughter in fee that he had in the previous item of the will devised to his wife for life.

SAME.—Admission of Evidence Explaining.—Partial Intestacy to be Avoided.—Where a will itself discloses the fact that there was a mistake in drafting the instrument, or there are sufficient indications of a latent ambiguity, it is not error to allow extrinsic evidence to be introduced for the purpose of explaining and arriving at the intention of the testator. A will is not to be so construed as to create a partial intestacy where the result can be reasonably avoided.

From the Ohio Circuit Court.

J. B. Coles and G. B. Hall, for appellant.

A. C. Downey, for appellees.

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ELLIOTT, J.—The controversy between the parties to this record is as to the ownership of part of lot sixteen in the city of Rising Sun. The merits of the case can not be ascertained and determined without quoting from the will executed by George Carpenter, deceased. In item third of the will it is written, among other things, that "I give, will and devise to my wife, Susannah Carpenter, the house and lot on which I now reside, being parts of lots number fifteen and sixteen in the city of Rising Sun, Indiana, to have and to hold the same and all the appurtenances thereunto belonging for and during her natural life." Item fourth of the will reads thus: "I further will, give and devise the same lot number fifteen so devised to my said wife during her lifetime, together with all the appurtenances thereto belonging, to my youngest daughter, Eliza Jane Carpenter, and to her heirs in fee simple forever, and free from incumbrance, and to come to her peaceable possession at the death of her said mother." There is no other reference either to lot fifteen or lot sixteen in the will except that made in the items designated. The appellant's position is that the will devises to the testator's daughter, Eliza Jane, lot fifteen only, and that parol evidence is not admissible to explain, qualify or limit the language of the instrument. The appellees contend that there is a mistake in the description of the property intended to be devised to the testator's daughter, and that, as the mistake is apparent on the face of the will, extrinsic evidence is admissible to explain the mistake, and show what property the testator intended to devise to his daughter.

It is undoubtedly the general rule that where property is well described, and there is no latent ambiguity in the language employed, nor any mistake apparent upon the face of the will, extrinsic evidence can not be resorted to for the purpose of qualifying, limiting or aiding the description. Courts will not change the words of a will by considering extrinsic evidence unless the instrument itself supplies suf-

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ficient reason for inferring that there was a mistake in drafting it, or sufficient indications of a latent ambiguity are disclosed. *Judy v. Gilbert*, 77 Ind. 96, and authorities cited; *Bunnell v. Bunnell*, 73 Ind. 163; *Sturgis v. Work*, 122 Ind. 134. We regard the rule as settled, and we can not depart from it, but we do not regard this case as within the rule. Our conclusion is that if the will itself does not *ex vi termini* vest a fee in the daughter, it at least discloses a mistake on the part of the draftsman of such a nature as to make it proper to resort to extrinsic evidence. We do not say that it was necessary to resort to such evidence, for we incline to the opinion that the will itself shows that it was the intention to vest in the testator's daughter the fee to the same property as that in which a life estate was vested in the wife. We are satisfied, at all events, that there was no harm done the appellant in resorting to extrinsic evidence, for that evidence comports with the language of the will, and makes the intention of the testator quite clear.

Our reason for the conclusion that the daughter is entitled to the same property in fee as that in which the mother was given an estate for life is that the will, taken as an entirety, fairly and justly requires this construction, inasmuch as there are words which in themselves indicate that the daughter should receive the fee after the termination of the mother's life estate, and there is no other disposition of the fee except that made in the devise to the daughter. It is a familiar rule that a will is not to be so construed as to create a partial intestacy when that result can be reasonably avoided. In this instance it is reasonable to conclude that the testator did intend that all of the property on which he resided should go to his daughter, and hence it is our duty to avoid the conclusion that he left part of that property undisposed of by his will.

We are well satisfied that the judgment below is right upon the merits, and refer to the following cases as supporting our conclusion: *Sturgis v. Work*, *supra*; *Pocock v.*

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Redinger, 108 Ind. 573, and cases cited; *Jackson v. Hoover*, 26 Ind. 511; *Cruse v. Cunningham*, 79 Ind. 402; *Black v. Richards*, 95 Ind. 184; *Cleveland v. Spilman*, 25 Ind. 95.

Judgment affirmed.

Filed June 17, 1892.

No. 15,186.

THE PENNSYLVANIA COMPANY v. HORTON.

RAILROAD.—Personal Injuries.—Complaint.—Averment as to Contributory Negligence.—Motion to Make More Specific.—In an action against a railroad company to recover damages for a personal injury, a general averment that the injury happened without the fault or negligence of the plaintiff is sufficient. It is not necessary to set out affirmatively all the precautions taken to avoid the injury. If a more particular and definite statement of the facts was desired, the remedy was by motion to make the complaint more specific. For review of the evidence see close of the opinion.

SAME.—Rate of Speed.—Violation of City Ordinance.—Negligence per se.—It is negligence per se to run a train of cars in violation of a city ordinance, and if any one is injured in consequence of such negligence without being himself guilty of contributory negligence, he may recover damages for such injury.

SAME.—Instructions to Jury.—Injury at Crossing.—Care to be Exercised by Plaintiff.—In an action against a railroad company to recover damages for a personal injury, the defendant can not successfully complain of an instruction which informed the jury that "if safety under the circumstances required that he (plaintiff) should stop his horse to ascertain whether it was safe to cross the track or not, it was his duty to stop and look and listen, and if, failing in this, he was caught by the engine and injured, he can not recover."

SAME.—An instruction in such an action that the plaintiff could not recover if "at the time of and just preceding the injury he could, by looking in the proper direction, have seen the train coming towards him in time to have avoided the injury," although no warning was given of its approach, and although the train was running in violation of a city ordinance, is not objectionable because of the omission of the element of listening, the same having been fully treated of in other instructions.

INSTRUCTIONS TO JURY.—Omission of Statement of Fact.—When instructions

132	189
132	171
132	189
163	256

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are given to the jury applicable to the law of the case they are not objectionable because they do not state any facts, nor advise the jury what the plaintiff should have done under the circumstances to have shown him to be in the exercise of due care.

MUNICIPAL CORPORATION.—*Incorporation of.*—*Judicial Notice Taken of.*—Judicial notice will be taken by the courts that a city is incorporated under the general laws of the State.

EVIDENCE.—*Objection to.*—*Must be Specifically Stated.*—*Authentication of Ordinance.*—An objection to the authentication or proof of an ordinance must be specifically pointed out. Questions will not be considered for the first time on appeal when the attention of the court below was not specifically called to the grounds of the objection.

From the Porter Circuit Court.

J. Brackenridge and A. Zollars, for appellant.

E. D. Crumpacker and S. C. Spencer, for appellee.

MILLER, J.—This action was brought to recover for a personal injury suffered by appellee on the 13th of November, 1884, at a street crossing in Warsaw, Kosciusko county, by collision with the engine of a passenger train of cars running on the Pittsburgh, Fort Wayne and Chicago railway.

At the time of the injury, the appellee, as alleged in the complaint, was driving a horse and wagon along Washington street in Warsaw, from the north towards the south. It is further alleged that the railway crossed the street on an embankment twelve feet high, maintained by the appellant; that the approaches to the track were steep and narrow, and that passengers on the street could, with difficulty, see approaching trains until they reached the top of the embankment at said crossing; that a side track was maintained by appellant along the north side of its main track across Washington street, and extended east and west therefrom, a distance of 100 yards, and that adjacent to appellant's right of way, on the west side of Washington street, a large saw mill, sash factory and manufactory of wooden wares was located, which, when in operation, made a noise so similar to that of an

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approaching train of cars, that it was difficult to distinguish the one from the other, but that the ringing of a bell or sounding of a whistle could have been distinctly heard; that at the time of the injury, appellant negligently permitted its freight cars to stand all day on said side track and upon and into Washington street, and leaving only fifteen feet between its cars, for passengers and teams to pass along said street and on its track, although the street was open and used by the public to the width of eighty feet; that Warsaw was an incorporated city at the time of, and for a long time prior to the injury; and by an ordinance duly passed by the common council, and then in force, prohibited steam cars and locomotive engines within said city from moving at a greater rate of speed than five miles an hour; that at the time of his injury the appellee was lawfully passing along Washington street from the north to the south driving a horse, and was about to cross appellant's track, where it crossed said Washington street, being a public street and much used by the public, and that by reason of said embankment and its steep and narrow approaches, and the freight cars standing upon the side track and in said street obstructing the appellee's view of the main track, he was unable to see an approaching train passing westward along the main track, and by reason of said mill and factory being in action he was unable to see and hear said train approaching, and while so carefully passing along said street, and about to cross the railway track, and carefully seeking to avoid danger from any engine and cars, and without fault on his part, he was run into by a locomotive and train of cars of appellant, passing along the main track from the east to the west, unlawfully, carelessly, and running at the rate of twenty-five miles per hour, without ringing the bell or sounding the whistle, within 100 yards to the east of said street crossing; that by reason of the foregoing premises the appellee was

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wholly unaware of the approach of the train until he was struck by the same and violently thrown from his wagon and his arm and leg broken, and all without fault or negligence on his part.

A demurrer was overruled to the complaint, exception taken and the ruling is assigned as error.

The counsel for appellants do not assert that the complaint does not sufficiently charge negligence on the part of the defendant, but insist that the facts stated show that the appellee was, at the time of his injury, guilty of contributory negligence.

A general averment that the injury happened without the fault or negligence of the plaintiff is sufficient, unless it appears from other more specific averments that he was in fact negligent. The complaint charges, in effect, that the crossing was a dangerous one; and while it is incumbent upon a traveler in approaching such a crossing to use care and caution reasonably commensurate with the known or apparent danger to be apprehended, it is not necessary to set out, affirmatively, all the precautions taken to avoid injury; the general allegation that the injury occurred without the fault or negligence is all that is necessary. We find no averment in the complaint inconsistent with the statement that he was without fault. If the defendant desired a more particular and definite statement of the facts, the remedy, if any, was a motion to compel the plaintiff to make the complaint more specific. *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 588; *Ohio, etc., R. W. Co. v. McCartney*, 121 Ind. 385; *City of Anderson v. East*, 117 Ind. 126; *Evansville, etc., R. W. Co. v. Crist*, 116 Ind. 446; *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196.

The appellant insists that the court erred in giving the first instruction to the jury. The portion of this instruction objected to is as follows:

"If you find from the evidence that the view of the approaching train was obstructed by buildings, trees, and

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cars on defendant's railroad at such crossing, to a traveler on such street from the north, and at the time of the injury a valid ordinance of the city of Warsaw was in force limiting the rate of speed of defendant's trains to five miles an hour in said city, and that the train which injured plaintiff was at the time of the injury running at the rate of ten or fifteen miles an hour, then the defendant was guilty of negligence. And if you find that such negligence produced the plaintiff's injury without any negligence on the plaintiff's part which contributed to the injury, then your verdict should be for the plaintiff."

This instruction contained a correct enunciation of the law relating to what it took to establish actionable negligence on the part of the defendant. It is negligence *per se* to run a train of cars in violation of a city ordinance, and if any one is injured in consequence of such negligence, without being himself guilty of contributory negligence, he may recover damages for such injury. *St. Louis, etc., R. W. Co. v. Mathias*, 50 Ind. 65; *Pennsylvania Co. v. Hensil*, 70 Ind. 569; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305.

The instruction does nothing more than inform the jury of the law upon this subject, leaving it to other and subsequent charges to direct their attention to the subject of contributory negligence.

We discover no infirmity in this instruction.

Complaint is also made of the *second* and *third* instructions.

They are as follows:

Second. "The plaintiff was bound to use ordinary care under the circumstances shown to have existed in this case.

He was bound to approach the railroad carefully and to look and listen for the approach of trains, and if the evidence shows that he did this, with that degree of care that

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an ordinarily prudent person would have exercised under all the circumstances, and was unable to hear or see the train approaching until it was too late to avoid the collision, then he was not guilty of contributory negligence."

Third. "There is no law requiring a man in the lawful use of a public street approaching a railroad crossing, to stop his vehicle before crossing, but he is bound to use such care, under all the circumstances, as a man of ordinary care would have exercised under like circumstances. And if you find that Horton exercised such care at the time of, and preceding the injury, he was not guilty of contributory negligence."

Counsel for appellant concede the law to be as laid down in these instructions as an abstract proposition, but insist that when applied to the facts of this case they were too general and indefinite, and such as tended to mislead the jury.

We are satisfied that these instructions were not only correct as abstract propositions of law, but that when taken in connection with the other instructions, they correctly and fairly submitted the questions of law involved in the case to the jury.

The objections urged to these charges are that they do not state any facts, nor advise the jury what the appellee should have done under the circumstances to have shown him to be in the exercise of due care.

It was not necessary, nor would it have been proper, for the court to have entered into a discussion of the facts. The court stated the law to the jury, applicable to the case, and left it to them to determine, from the evidence, whether there had been negligence on the part of the plaintiff contributing to the injury.

In the eighth instruction the jury were told that:

"If safety, under the circumstances, required that he should stop his horse to ascertain whether it was safe to

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cross the track or not, it was his duty to *stop* and *look* and *listen*, and if, failing in this, he was caught by the engine and injured, he can not recover."

We think it apparent that the appellant has no cause to complain of this instruction.

In the tenth instruction the court told the jury :

"If you find that at the time of, or just preceding the injury, Horton approached the railway crossing, and could, by looking in the proper direction, have seen the train coming toward him in time to have avoided the injury, even although the engineer gave no warning of his approach by ringing the engine bell or otherwise, and though the train was running fifteen or twenty miles an hour, still your verdict must be for the defendant, for if you find under such circumstances Horton omitted to look for the train, he was guilty of such negligence as deprives him of the right to recover."

This instruction was pertinent to the theory of the defence, that the plaintiff might by looking have seen the approaching train, and was not objectionable on account of the omission of the elements of listening, which was fully treated of in other instructions.

Some criticism is made of other instructions, but as no objections were made to them upon the trial, we can not consider them now. Taken as a whole, the instructions were quite favorable to the defendant.

An ordinance of the City of Warsaw was, over the objection of the defendant, given in evidence, and this is claimed to have been erroneous. The objections were that there was no evidence that the city had been legally incorporated, and because the copy was incompetent.

We take judicial notice that Warsaw is an incorporated city under the general laws of this state. *Stultz v. State ex rel.*, 65 Ind. 492; *Town of Albion v. Hetrick*, 90 Ind. 545; *Woodward v. Chicago, etc., R. W. Co.*, 21 Wis. 313; *Com. v. Intoxicating Liquors*, 103 Mass. 448:

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The other objection is too indefinite and uncertain to raise any question. If the objection was to the authentication or proof of the ordinance, the specific objection should have been pointed out. This would have been fair to the court and to the adverse party. We can not consider questions for the first time in this court where the attention of the court below was not specifically called to the grounds of the objection.

We have read the evidence with care, and find it very conflicting, upon every material question, except the location of the place where the accident took place; and the fact that the train was running at a rate in excess of that allowed under the city ordinance.

The appellee in his evidence shows that he approached the track carefully, driving in a slow walk; that his hearing and sight were good, and the movement of his wagon in no respect interfered with either; that a number of freight cars stood on the side track east of the crossing and extended out into the street, so that it was impossible to see the approaching train until he was right on the main track; that although he listened he did not hear the whistle sound, the bell ring, or the cars run; that he looked and listened attentively while approaching the track; that he knew that a great many trains were run over the road every day, but did not know the time of any of them; that from that point the railroad curved to the south; and that he had never crossed the road at that point before.

The testimony given by the plaintiff was, to some extent, corroborated by other evidence.

We regard the evidence as sufficient under the authority of *Ohio, etc., R. W. Co. v. Buck*, 130 Ind. 300; and *Cleveland, etc., R. W. Co. v. Harrington*, 131 Ind. 426, to make out a case in favor of the plaintiff. •

Judgment affirmed.

Filed April 30, 1892; petition for a rehearing overruled Sept. 16, 1892.

The Indianapolis Chair Manufacturing Company v. Swift.

No. 15,776.

THE INDIANAPOLIS CHAIR MANUFACTURING COMPANY
v. SWIFT.

ATTORNEY AND CLIENT.—Action for Legal Services.—Verdict.—Evidence to Sustain.—Excessive Recovery.—In an action by an attorney against a corporation for the value of legal services, a judgment in favor of the plaintiff will not be reversed for the want of evidence to support it, where the record of the action in which the services were claimed to have been rendered showed that plaintiff appeared as attorney for the corporation, and filed an answer signed by him as its attorney, and he testified that he was employed by the corporation and rendered the services for it. Neither will the judgment be reversed on the ground that the amount of the verdict is too large, there being evidence to support the verdict.

From the Marion Superior Court.

G. W. Stubbs and *C. E. Averill*, for appellant.

F. Winter and *J. B. Elam*, for appellee.

OLDS, J.—This is an action by the appellee against the appellant for the value of his services as an attorney rendered to the appellant in an action wherein one Frank E. Helwig was plaintiff, and the appellant, the Indianapolis Chair Manufacturing Company, and others, were defendants, in which action the plaintiff sought to have a receiver appointed to take charge of the assets of the corporation and wind up its affairs. The action was commenced in the Marion Superior Court, an appeal was taken to the general term and from there an appeal taken to the Supreme Court. After the cause had been briefed and orally argued in the Supreme Court, there was a settlement made between the parties.

In this cause there was a trial, verdict and judgment in favor of the appellee.

A reversal of the judgment is sought for the reason that the evidence is not sufficient to support the verdict.

The president of the company was a party defendant in

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the original action, and the appellee appeared and filed an answer for him, as well as for the corporation.

The record in that cause is put in evidence in this, and it is in effect contended by counsel for appellant that the record in the original cause conclusively shows the appellee to have appeared for and acted solely as the attorney for the president of the corporation, and not as the attorney of the corporation. We can not agree with this theory. The name of the appellee appears to the answer of the corporation as one of its attorneys in that cause, and the appellee brings this action for the value of his services rendered as attorney for the corporation, and he testifies as a witness, in his own behalf, that he was employed as the attorney of the corporation and rendered the services for it. There is no such case presented as will authorize this court to reverse the judgment on account of a failure of the evidence to support the verdict.

It is further contended that there should be a reversal, for the reason that the amount of the verdict is too large; that the evidence does not sustain the amount of the verdict. A number of witnesses testify as to the value of the appellee's services, some of them place the value greater than the amount of the verdict, and some at a less amount. There was also some discrepancy relating to the amount of services rendered as stated in some of the hypothetical questions, and as shown by the evidence. The province of the jury was to apply the evidence as to the value to the evidence as to the amount of the services rendered, and return a verdict for the value of the service they find to have been rendered. There is clearly evidence sufficient to support the verdict as to the amount.

There is no error in the record.

Judgment affirmed with costs.

Filed Sept. 15, 1892.

 Clarke v. The Pennsylvania Company.

No. 15,154.

CLARKE v. THE PENNSYLVANIA COMPANY.

RAILROAD.—Fellow-Servants.—"Section Boss" and Section Hand.—A member of one "section gang" is a fellow-servant of the boss of another "section gang" employed by the same railroad company, they being engaged in the same general service and in the same line of duty, and he can not recover for an injury occasioned by the negligent running of the hand-car, in charge of said boss, into the hand-car on which the plaintiff was riding.

NEGLIGENCE.—Contributory.—Action Under Apprehension of Sudden Danger.—One who does an act under an impulse, or upon a belief created by a sudden danger, attributable to another's negligence, is not to be regarded as guilty of contributory fault, even though the act be regarded as a negligent one, if performed under circumstances not indicating sudden peril.

From the Bartholomew Circuit Court.

F. T. Hord and *M. D. Ewing*, for appellant.

S. Stansifer, for appellee.

ELLIOTT, J.—The material facts stated as the appellant's cause of action are these: He was in the service of the appellee in the capacity of a "section man," and was a member of what was called the "floating gang of section men." His "gang" was under the control of a foreman or "boss," who employed and discharged its members. On the 4th day of August, 1886, the "gang," under the control of its foreman, started on a hand-car from Jonesville to a point south of that station, where it was to enter upon the work of loading and unloading gravel. On the same day another gang of men, under the control of a "section boss," was engaged in repairing the track, and was riding on a hand-car, as custom and duty required. The car on which this gang was riding was following the car on which the "floating gang" was riding. The car occupied by the appellant was running at the rate of seven miles an hour, and the appellant was propelling the car, standing with his back to the north and

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160	28
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162	91
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166	70
168	474

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170	376

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to the car which was following. The car occupied by the "section gang" overtook that on which the "floating gang" was riding, and was, through negligence, run against the car in front, causing it to bound forward, and the appellant, being startled by the sudden collision and the act of the "section boss" in placing his hand under his arm, loosened his hold of the propeller, fell back upon the track and the car of the "section boss" ran over him, seriously injuring him.

The act of the appellant in loosening his hold upon the propeller can not be treated as contributory negligence, as it was influenced by a sense of sudden and impending danger. One who does an act under an impulse or upon a belief created by a sudden danger attributable to another's negligence is not to be regarded as guilty of contributory fault, even though the act would be regarded as a negligent one if performed under circumstances not indicating sudden peril. The principle we have stated is an old one and firmly imbedded in jurisprudence. *Indianapolis, etc., R. W. Co. v. Carr*, 35 Ind. 510; *Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143; *Buel v. New York, etc., R. R. Co.*, 31 N. Y. 314, *Johnson v. Westchester, etc., R. R. Co.*, 70 Pa. St. 357; *Pittsburgh, etc., R. W. Co. v. Taylor*, 104 Pa. St. 306 (49 Am. R. 580); *Stokes v. Saltontsall*, 13 Pet. 181; *Jones v. Boyce*, 1 Stark. 402.

The important question in the case is whether the appellant can be considered as the fellow-servant of the "section boss" in control of the car which was negligently propelled against that on which the "section gang" was riding, for if he was, there can be no recovery. Our decisions, and there is a very long line of them, make it our imperative duty to adjudge that the members of both parties of section men were co-employees. They were engaged in the same general service and in the same line of duty. It is unnecessary to comment upon our decisions in detail; it would, indeed, be unprofitable to cite them all, since the question can

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not be regarded as an open one in this jurisdiction. Of the numerous cases we cite only these: *Ohio, etc., R. R. Co. v. Tindall*, 13 Ind. 366; *Wilson v. Madison, etc., R. R. Co.*, 18 Ind. 226; *Slattery v. Toledo, etc., R. W. Co.*, 23 Ind. 81; *Ohio, etc., R. R. Co. v. Hammersley*, 28 Ind. 371; *Gormley v. Ohio, etc., R. W. Co.*, 72 Ind. 31; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Capper v. Louisville, etc., R. W. Co.*, 103 Ind. 305; *Cincinnati, etc., R. W. Co. v. Lang*, 118 Ind. 579; *Lake Shore, etc., R. R. Co. v. Stupak*, 123 Ind. 210 (222); *Bier v. Jeffersonville, etc., R. R. Co.*, ante, p. 78. It is probably true that some of the earlier cases we have cited state the doctrine more broadly than the later and better considered cases authorize, and we are not to be understood as approving them in all respects, but the general doctrine they state, limited to such cases as this, is that of the very latest decisions upon the subject.

It is obvious that the cases which declare that an employer must furnish safe working places and appliances for his employees is not effective in this instance, for here the only negligence charged was that of an employee in using the appliances furnished by the employer.

The decisions which sanction and apply what may, with aptness, be called the departmental doctrine are not relevant to the case stated in the complaint. We fully sanction the rule that where the employer commits a separate department to the charge of an employee, and constitutes him his representative in that department, the employee stands in the employer's place, and his negligence is the negligence of the employer. The rule to which we refer is illustrated by such cases as *Nall v. Louisville, etc., R. W. Co.*, 129 Ind. 260; *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124; *Ohio, etc., R. W. Co. v. Pearcy*, 128 Ind. 197 (203); *Indiana Car Co. v. Parker*, 100 Ind. 181; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642. Here there was no separate and distinct department of which the "section boss" had charge as the representative of the employer, but, on the contrary, the only

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difference between the two employees, the appellant and the "section boss," was that the latter was higher in rank than the former. But this difference in rank or power, as it has been adjudged over and over again, does not destroy the relationship of those in the service of a common master as co-employees.

Counsel refer to the case of *Pittsburgh, etc., R. W. Co. v. Kirk*, 102 Ind. 399, but all we need say of that case is that it was not one wherein one employee of the common employer sought damages for an injury caused by the negligence of a co-employee. Of the cases from other courts which are cited as holding a different doctrine from that so long held by our own court it is enough to say that we can not regard them as authority.

Judgment affirmed.

Filed Sept. 15, 1892.

No. 15,860.

WILLIAMSON ET AL. v. WOTEN.

FRAUDULENT REPRESENTATIONS.—Real Estate—Sufficiency of Complaint—

Vendor's Lien.—In an action to recover damages because of fraudulent representations alleged to have been made by the defendants in a real estate trade the complaint alleged that the defendants were partners residing at Portland, in Jay county, and were engaged in the practice of law and in the real estate business; that the plaintiff owned a farm in said county and placed it in the hands of the defendants for sale; that after failing to sell it for several months defendants purchased it themselves and conveyed to them a tract of land situated in Kansas; that the defendants made certain false and fraudulent representations concerning the Kansas land, which were relied upon by the plaintiff, and by reason of which he was induced to accept the land at the price agreed upon; that if the land had been as represented it would have been worth the price, but that the representations were false, and the land was worth a much less price.

Held, that the complaint stated a good cause of action.

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Held, also, that upon the averments of the complaint the plaintiff was entitled to a vendor's lien for such amount as might be found due on account of the difference in the value of the land.

From the Jay Circuit Court.

D. T. Taylor, R. S. Gregory, R. H. Hartford, J. J. M. La Follette, R. C. Silverburg and O. H. Adair, for appellants.

J. W. Headington, J. F. La Follette and W. Thompson, for appellee.

OLDS, J.—This was an action brought by the appellee against the appellants for damages growing out of fraudulent representations made by the appellants regarding certain Kansas lands which the appellee was induced to take at a certain stipulated price in exchange and as part payment for a tract of land owned by the appellee and situate in Jay county, and sold and conveyed by him to the appellants.

There was a trial and finding and judgment in favor of the appellee, and the same declared to be for the purchase-money of the Jay county land, and a vendor's lien existing in favor of the appellee, and a decree rendered for the sale of the land for the payment of the judgment.

The first question presented relates to the sufficiency of the complaint, which is in two paragraphs, to each of which the appellants demurred, and their demurrer was overruled, and exceptions reserved, and the ruling assigned as error.

The paragraphs are substantially the same, pleading the same facts, but differing slightly in phraseology. The facts pleaded show that the appellants were partners, residing at Portland, in said Jay county, and were engaged in the practice of the law and in the business of buying and selling real estate for other parties; that appellee owned a farm in said Jay county, and placed it in the hands of the appellants for sale; that after failing to sell it for several months, appellants proposed purchasing it themselves, and to cause to be conveyed to the appellee, as part payment, a tract of land situated in the State of Kansas, owned by a third party, but which they

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could secure by another trade or purchase, and procure the owner to convey the title to the appellee as part payment for his tract of land in Jay county. The trade was consummated, and appellee conveyed his land in Jay county to the appellants, and the appellants caused the conveyance of the Kansas land to the appellee, and it is alleged that the appellants made certain false and fraudulent representations concerning the Kansas land, which were relied upon by the appellee, and by reason of which he was induced to accept the land at the price agreed upon, and that if the land had been as represented, it would have been worth the price, but that the representations were false, and the land was worth a much less sum.

The facts are well pleaded, showing that the appellee was fraudulently induced to accept in payment for the purchase-money of his Jay county land property worth much less than it would have been had it been as represented.

Each paragraph is clearly sufficient to withstand a demurrer, and showing the appellee entitled to a vendor's lien for such amount as may be found due him on account of the difference in the value of the land. See *Nyswander v. Lowman*, 124 Ind. 584, and authorities there cited.

What we have said disposes of all the questions presented in the case except those arising on the evidence, and the evidence is not in the record.

There is no error.

Judgment affirmed, with costs.

Filed Sept. 14, 1892.

Ewing v. Smith.

No. 15,948.

EWING v. SMITH.

REAL ESTATE—Conveyance of.—Want of Consideration.—Parol Evidence Admissible.—When there is fraud or mistake in executing or securing the execution of a conveyance, for which no consideration is paid, parol evidence is admissible.

EVIDENCE.—When Admissible to Show Fraud or Mistake.—When the defendant answered by general denial, and also filed a cross-complaint, there was an issue formed under which evidence tending to prove fraud and mistake was admissible.

From the Cass Circuit Court.

F. Ullman, J. C. Nelson, and Q. A. Myers, for appellant.

D. D. Dykeman, W. T. Wilson, G. C. Taber, and M. Winfield, for appellee.

ELLIOTT, J.—The controlling questions which this record presents are settled against the appellants by the decision in the case of *Ewing v. Wilson*, *post*, p. 223, and with those questions the incidental ones were necessarily determined.

The trust deed upon which the appellants rely, and which confers the only shadow of title which they have, was fully considered in that case, and we adjudged that while its provisions were peculiar, it was on its face an effective conveyance, but we also adjudged that the question of whether there was fraud or mistake in executing it was a matter open to inquiry. We found in the course of our investigation of the authorities that many of them asserted that where it was proved that such an instrument was executed without consideration, the failure to insert a clause empowering the donor to revoke it would be attributed to mistake, but we did not find it necessary to go that far. We did, however, hold that the circumstances under which it was executed were such as to require the conclusion that it was executed

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through fraud or mistake, and that in either event it was revoked by the deed executed by the grantee reconveying the property to the grantor.

There can be no doubt that where there is fraud or mistake in executing or securing the execution of a conveyance for which no consideration is paid, parol evidence is competent. In this case the character of the instrument, with very slight additional evidence, fully opened the way to the admission of conversations between the grantor and grantee. We think it very clear that there was no error in admitting parol evidence nor in refusing to instruct the jury that they could not regard such evidence.

The appellees claimed title by their cross complaint, and they also answered the appellant's complaint by a general denial. Under our decisions the appellees had a right to prove their title under their cross complaint, and under their answer of general denial to the appellant's complaint they were entitled to give in evidence all defences, legal or equitable. There can, therefore, be no doubt that there was an issue under which the evidence tending to prove fraud and mistake was admissible.

Judgment affirmed.

Filed May 23, 1892; petition for a rehearing overruled Sept. 17, 1892.

No. 16,451.

WOOD, AUDITOR, v. THE SCHOOL CORPORATION OF CITY OF TIPTON.

TAXATION.—*Special School Tax.*—Board of School Trustees of City Has Power to Make Levy Independently of Commissioners.—*Duty of Auditor to Make and Extend the Assessment.*—A board of school trustees, for the purpose of creating a special school revenue in accordance with section 4467, R. S. 1881, levied a special school tax of 40 cents on each \$100 of taxable property in the city and 50 cents on each poll. The special levy was duly certified to the auditor of the county with the request that he make the proper assessment of the special school tax as levied by the board of trustees, and extend the same upon the tax duplicate; but the

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auditor, under the direction of the board of commissioners, failed and refused to extend the assessment on the tax duplicate, and modified the levy made by the board of school trustees.

Held, that section 4467, R. S. 1881, authorizes a board of school trustees of a city to levy the tax independently of the board of commissioners, and when made it is the duty of the auditor to make the assessment, and extend the same on the tax duplicate.

From the Tipton Circuit Court.

G. H. Gifford and J. M. Fippen, for appellant.

J. R. Parker, for appellee.

OLDS, J.—On the 15th day of September, 1891, the board of school trustees of the city of Tipton, for the purpose of creating a special school revenue in accordance with section 4467, levied a special tax in said city for the year 1891 of 40 cents on each \$100 of taxable property in said city, and 50 cents on each poll. After the said levy had been made, the secretary of said school board under his hand and the seal of the corporation duly certified said special tax levy to the appellant, the auditor of Tipton county, the county in which the city of Tipton is situated, with the request that said auditor make the proper assessment of said special school tax levied by said board of school trustees, and extend the same upon the tax duplicate. The auditor, under the direction of the board of commissioners of said county of Tipton failed and refused to extend said assessment on the tax duplicate as made by said board of school trustees, but on the contrary, acting under the advice, direction and control of said board of commissioners changed and modified the levy made by said school board to 30 cents on each \$100 taxable property and 50 cents on each poll, and made the proper assessment at such modified rate and extended the same on the tax duplicate of said county for the year 1891. The appellee brought this proceeding to compel the appellant by mandate to make the assessment and extend the same on the tax duplicate in pursuance of the

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assessment made by the board of school trustees. The complaint alleges the facts. A demurrer was filed to the same and overruled, and exceptions reserved. An answer was filed to the complaint alleging substantially the same facts, and a demurrer was sustained to it.

By the record the question is presented as to whether or not the board of school trustees of a city has the exclusive right to make such levies for school purposes or whether the board of commissioners of the county has the right to change and modify the levy made by the school board and in fact control the amount of the levy. Section 4467 provides that "The trustees of the several townships, towns, and cities shall have the power to levy a special tax, in their respective townships, towns, or cities, for the construction, renting, or repairing of school houses, for providing furniture, school apparatus, and fuel therefor, and for the payment of other necessary expenses of the school, except tuition; but no tax shall exceed the sum of fifty cents on each one hundred dollars' worth of taxable property and one dollar on each poll, in any one year," etc.

Section 4468 makes it the duty of the county auditor to make the proper assessment of special school tax levied by the trustee and extend the same on the tax duplicate.

The language of section 4467, *supra*, is such as to leave but little doubt as to the right of the board of trustees to make the levy independently of the board of commissioners, and the assessment is to be made and the tax extended by the county auditor. The board of commissioners are not required to take any action concerning such tax, and are not charged with any duty relating to the levy or assessment of it.

It is contended on behalf of the appellant that section 5995, R. S. 1881, is applicable to such levies, and that it must be made in connection with the board of commissioners and with its advice and concurrence, and in case

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of a failure to concur the board of commissioners shall make such levy, and that the opinion in the case of *Middleton v. Greeson*, 106 Ind. 18, supports their contention, but we can not give our assent to this theory. It is held in that case that the words "township trustees," as used in sections 6006 and 6007 relating to the contracting of debts, included trustees of school townships, as well as trustees of civil townships; in other words, that the provisions of the sections 6006 and 6007 governed whether the trustee of the school township who was the same person as the trustee of the civil township was acting in the capacity of trustee of the civil or the school township, but there is no provision of the statute requiring the board of trustees of a city to act in conjunction with the board of commissioners in the levying of a special tax, as provided in section 4467, *supra*, nor is there any provision requiring them to meet or act together for any purpose connected with such levy.

The view we take of section 4467 is that it authorizes the board of school trustees of a city to levy the tax independently of the board of commissioners, and that the latter has no control over the levying of such special tax, and that when levied by the board of school trustees, it is the duty of the county auditor to make the assessment and extend the same on the tax duplicate.

This view is in accordance with the opinions given by the State Superintendents of Public Instruction Hopkins and Smart, and in harmony with the opinion of this court in the case of *Carmichael v. Lawrence*, 47 Ind. 554. See *Thornton Indiana Municipal Law*, section 4467, and note containing extracts from the opinions of Superintendents Hopkins and Smart.

There is no error in the record.

Judgment affirmed with costs.

Filed Sept. 17, 1892.

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Wilson v. Bennett et al.

No. 15,695.

WILSON v. BENNETT ET AL.

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139 330**APPEAL.—In Term.—When Irregularities will not Invalidate.—Supreme Court.**

—Notice.—When an appeal bond is filed and approved in open court at the same term that the motion for a new trial was overruled, and within a reasonable time after the prayer for an appeal, an irregularity, such as the failure to name the sureties on the bond at the time of praying the appeal, will not invalidate the appeal. The appeal having been taken in term, notice was not required.

EVIDENCE.—Value of Life-Estate.—Non-Expert Witness.—A witness is not competent to testify as to how much a person's life-estate would be worth at sheriff's sale, considering his age and physical condition, when he is not shown to have the slightest knowledge of the matter upon which he necessarily gave an opinion in answering the question, viz.: the effect of the person's physical condition upon his expectancy of life.

From the Hamilton Circuit Court.

W. Booth, A. F. Shirts and M. Vestal, for appellant.

W. R. Fertig and R. R. Stephenson, for appellees.

ELLIOTT, C. J.—Thomas Bennett brought this suit against Phebe Wilson, David Wilson, and Ella Gatewood to set aside conveyances made by David Wilson to Phebe Wilson and Ella Gatewood. The trial court rendered a decree declaring the conveyance to Phebe Wilson by David Wilson fraudulent and annulling it, but confirming the conveyance made to Ella Gatewood. On the 12th day of May, 1890, the court overruled the appellant's motion for a new trial; the appellant thereupon prayed an appeal, and on the 20th day of the same month and during the same term filed in open court an appeal bond, which was then approved by the court.

The appeal must be regarded as taken in term, as all the acts requisite to such an appeal were performed during the term at which the final decree was rendered. It would probably have been more strictly in accordance with the rules of practice to have named the sureties on the bond at the time

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of praying the appeal, but, as the bond was filed at the same term and within a very few days after the appeal was prayed, the irregularity, if it be such, is not sufficient to invalidate the appeal. It has been very often held that where acts are done during term, it will be presumed that they were done pursuant to orders or directions of the court; and that rule applies here. A bond is essential to the effectiveness of a term appeal. *Ex parte Sweeney*, 131 Ind. 81. But where a bond is filed and approved in open court, at the same term and within a reasonable time after the prayer of an appeal, an irregularity will not invalidate the appeal. As this appeal was taken in term, notice was not required. Proceedings in term pursuant to law must be taken notice of by the parties. The motion to dismiss the appeal is overruled.

Bennett was asked and answered this question: "Considering the age and physical condition of David Wilson, state what his life-estate in the land would be worth at sheriff's sale where the purchaser would have to wait a year for possession, and pay the taxes on the land?" The witness answered that the estate would be worth fifteen or twenty dollars. It will be observed that the question, brief as it is, combines many elements in the hypothesis assumed, but under the objections stated we are required to consider only two of these elements. Inasmuch as we can consider only such specific objections as the record affirmatively shows were presented to the trial court, we do not inquire whether there are other objections to the question than those we act upon.

It is obvious that the question assumes that Bennett must have known Wilson's life expectancy, and this he could not know unless he had an acquaintance with the average duration of human life. No such acquaintance was shown. We do not doubt that an expert witness may give an opinion as to the probable duration of life, nor do we doubt that approved life tables, as they are called, may be used as evidence. *Martin v. Merritt*, 57 Ind. 34; *Shover v. Myrick*,

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4 Ind. App. 7 ; *Wager v. Schuyler*, 1 Wend. 554 ; *Schell v. Plumb*, 55 N. Y. 592 ; *Greer v. Mayor, etc.*, 1 Abb. Pr. (N. S.) 206 ; *Northwestern, etc., R. R. Co. v. Chandler*, 84 Ga. 37 ; *Blair v. Madison County*, 81 Iowa, 313. But in this instance the witness is not shown to have the slightest knowledge of the matter upon which he necessarily gave an opinion in answering the question asked him.

The infirmity we have pointed out is not the only one, for the question requires the witness to express an opinion upon Wilson's physical condition. The question could not be answered without an opinion of the witness as to the effect of Wilson's physical condition upon his expectancy of life. This the witness was not qualified to give, for there is no evidence tending to show that he possessed skill or knowledge constituting him an expert. It is possible that there may be cases where the physical condition of a person is so marked and peculiar as to make it competent for a non-expert witness to give an opinion as to the probable duration of life, but, granting that there may be such cases, this case is not one that can be taken out of the general rule. There is no marked peculiarity nor any distinctive feature that will authorize us to treat it as an exception, but, on the contrary, it is one which the general rule clearly covers and controls.

We can not say that the admission of the incompetent testimony was not prejudicial, for it was directed to a material point, and the evidence is not of such a character as to justify us in declaring the judgment so clearly right upon the merits that the erroneous ruling should be disregarded.

Judgment reversed, with instructions to sustain the appellant's motion for a new trial, and to try the case upon the issues joined between Bennett of the one side and David and Phebe Wilson of the other.

Filed May 10, 1892; petition for a rehearing overruled Sept. 15, 1892.

Warner et al. v. Warner.

No. 15,717.

WARNER ET AL. v. WARNER.

TRUST AND TRUSTEE.—Husband and Wife.—When Husband will be Deemed to Hold in Trust for Wife.—Real Estate.—Adverse Possession.—Statute of Limitations.—When a father, in consideration of natural love and affection, agreed to convey to his married daughter a certain tract of land, but before the conveyance was made it was mutually agreed between the father, the daughter and a brother of the daughter, who held a tract of land which he desired to exchange for the first named tract, that the father should convey said tract to the brother of appellee, and in return therefor the brother should convey his tract of land to appellee; that the land, as per agreement, was conveyed by the father to the brother of appellee, and that appellee entrusted the conveyance of the land, to be made to her by her brother, in the hands of her husband as her agent; that instead of making the conveyance to her the husband fraudulently took the conveyance in his own name, and concealed the fact from appellee, and such fact did not come to her knowledge until after the death of her husband, who died intestate.

Held, that such action by the husband was a gross fraud upon the rights of the wife, and that equity will hold the husband to be the trustee of the wife, and that the property so held in trust is not subject to the debts of the husband.

Held, also, that the question as to whether the wife did or did not have adverse possession of the land was wholly immaterial, the evidence and the special findings showing that the husband fully recognized the right of the wife up to the time of his death.

Held, also, that the statute of limitations would not commence to run until the husband disowned his trust.

From the Wells Circuit Court.

L. Mock, A. Simmons, C. L. Holstein and C. E. Barrett,
for appellants.

A. N. Martin, G. C. Vaughn and J. H. C. Smith, for appellee.

COFFEY, J.—The first paragraph of the complaint in this cause is an ordinary complaint to quiet title to land, based upon an alleged legal title held by the appellee.

The second paragraph alleges, in substance, that in the year 1851 Henry Gehrett, who was the father of the appellee, was

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the owner in fee of an eighty-acre tract of land in section two, township twenty-five, range twelve, in Wells county, which, in consideration of natural love and affection, and in order to provide her a home, as he had done for his other children, he agreed to convey to the appellee, who was the wife of Jacob Warner, in fee simple; that Samuel Gehrett, who was the appellee's brother, was at the same time the owner of the eighty-acre tract of land described in the complaint, in section 14 of the same township and range, which he was desirous of exchanging with the appellee for the eighty-acre tract proposed to be conveyed her by her father; that it was mutually agreed between the appellee and her husband, Jacob Warner, her father and the said Samuel Gehrett, that her father should convey said land in section two to the said Samuel, and that in consideration thereof the said Samuel should convey the tract so owned by him to the appellee; that in pursuance of said contract the appellee's father did convey the tract so intended for her to Samuel, and she entrusted the said Samuel and her husband with the business of making a conveyance of the land by Samuel to her; that in violation of his trust the said Jacob procured said land to be conveyed to himself; that said conveyance was made to her husband, Jacob Warner, without her knowledge or consent; that he paid no consideration therefor whatever, the same being made solely in consideration of the tract of land so conveyed by her father to the said Samuel Gehrett; that said Jacob never recorded said conveyance, and never made known to her the contents of the same, and never in her presence claimed to be the owner of said land; that she had full confidence in her husband, and always believed that the land had been conveyed to her, and, so believing, has ever since the execution of said conveyance claimed to be the owner thereof, and has always since its execution in the year 1851, both personally and through her said husband as her agent, been in the continuous, open and adverse possession of said land as sole owner thereof; that her hus-

band, Jacob Warner, died intestate on the 17th day of March 1887, when for the first time she discovered that said conveyance had been made to him and not to her; that all the appellants are the children and only heirs of said husband, except the appellants Pedrick and Pedrick, who are judgment creditors. Prayer that the deed be declared void, except in so far as she is entitled to have the title thereby conveyed decreed to be held in trust for her by the said Jacob Warner.

The third paragraph is a complaint to quiet title based upon an alleged twenty years' adverse possession of the land by the appellee.

The appellants filed answers and cross-complaints, and upon issues joined the cause was tried by the court, a special finding of facts and conclusions of law thereon being filed, upon which the court entered judgment for the appellee.

It is assigned as error that the court erred in overruling a demurrer to the second paragraph of the complaint. It is contended that the facts stated in this paragraph bring the case within the rule that a court of chancery will not enforce an unexecuted, imperfect trust in favor of a volunteer, as held in the case of *Wright v. Moody*, 116 Ind 175, and in the case of *Pearson v. Pearson*, 125 Ind. 341.

We are not inclined to adopt this contention. There is here present something more than a mere unexecuted trust, and the appellee is in no sense a volunteer. She had a contract by the terms of which the land in controversy was to be conveyed to her in consideration of the conveyance to the owner of a tract which was intended by her father as an advancement to her of a part of his estate. The land intended for her was conveyed to her brother pursuant to the contract, and she entrusted the consummation of her agreement to her husband, in whom she naturally had confidence. Instead of faithfully executing his trust, as her agent, he took the conveyance to himself. This was a gross fraud upon her rights, and in such case equity will decree the agent to be the trustee of the principal. Perry Trusts, sections

Warner et al. v. Warner.

240, 241; 2 Pom. Eq. Jur., section 1044; 2 Washb. Real Prop. 476; *Cox v. Arnschmann*, 76 Ind. 210; *Lord v. Bishop*, 101 Ind. 334; *Warren v. Hull*, 123 Ind. 126.

The facts in this case bring it clearly within the principles announced in the case of *Lord v. Bishop*, *supra*.

As said in *Warren v. Hull*, *supra*, "Certainly, the husband can not wrest from his wife her father's gift, and, if he can not, neither can his creditors."

The appellee's husband never had a dollar invested in the land in dispute, and to permit him to take and hold it without the consent of the appellee would be the grossest injustice. In our opinion the second paragraph of the complaint states a cause of action.

The special finding of facts corresponds with the allegations in the second paragraph of the complaint, and is, in our opinion, fully sustained by the evidence. The question as to whether the appellee did or did not have adverse possession of the land is wholly immaterial, as the evidence, as well as the special findings, shows that the husband fully recognized the right of the appellee up to the time of his death.

The statute of limitations would not commence to run until he disavowed his trust. The court did not err, in our opinion, in its conclusions of law upon the facts as stated in the special finding.

It is also urged that the court erred in admitting certain evidence over the objection of the appellants, and in overruling certain motions made by them relating to the facts to be contained in the special findings of the court.

We have carefully examined the questions here presented, and find no error. No good purpose would be subserved by setting out these questions in this opinion.

In our judgment this cause was correctly determined upon its merits in the circuit court.

Judgment affirmed.

Filed May 24, 1892; petition for a rehearing overruled Sept. 16, 1892.

The Town of Winamac *et al.* v. Huddleston.

No. 16,614.

THE TOWN OF WINAMAC ET AL. v. HUDDLESTON.

CITIES AND TOWNS.—Power to Issue Bonds.—A town can not, under the Constitution of this State, issue bonds to obtain funds with which to rebuild a school-house, when the issuance of the bonds will create a debt in excess of two per centum of the taxable value of the property within the corporate limits of the town.

SAME.—Enjoining Issuance of Bond.—A taxpayer may maintain an injunction to prevent the issuance of corporate bonds without authority.

From the Pulaski Circuit Court.

B. Borders and *F. L. Duke*, for appellants.

J. C. Nye and *R. A. Nye*, for appellee.

ELLIOTT, J.—The board of trustees of the town of Winamac adopted an ordinance directing bonds of the town to be issued to procure funds with which to rebuild a school-house that had been destroyed by fire. The ordinance directs the proper officers to execute the bonds of the corporation, and the officers propose to execute the bonds as directed. The bonds, if issued, will create a debt in excess of two per centum of the taxable value of the property within the corporate limits of the town.

There can be no doubt that if the bonds are executed as proposed, and are of any validity, they will create a debt against the public corporation. In this particular, as in others, this case is radically different from that of *City of Valparaiso v. Gardner*, 97 Ind. 1. The debt created by a bond executed by a public corporation is not an obligation payable out of specific funds, but is a contract to pay money generally, and hence this case is not within the doctrine of such cases as *Quill v. City of Indianapolis*, 124 Ind. 292; *Strieb v. Cox*, 111 Ind. 299; *Board, etc., v. Hill*, 115 Ind. 316. A valid bond binds the corporation directly and unconditionally, unless it is otherwise expressly stipulated in the instrument or provided by law. If the bonds proposed

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151 232

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162 197

The Town of Winamac *et al.* v. Huddleston.

to be issued are not valid because of want of authority, then, no matter what may be the cause of the invalidity, they should not be issued, so that if counsel are right in saying that the town has no authority to issue the bonds the judgment below must be sustained. If there was error in favor of the appellants, they can not successfully complain. See authorities cited in Elliott App. Proc., sections 314, n. 2, 317, n. 2.

The constitutional provision restricting the power of public corporations to incur debts reads thus: "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void."

We can see no possible reason for holding that bonds issued to build a school-house are not within the constitutional provision quoted, nor can we conceive of any reason upon which it can be held that because there is a provision or promise to levy taxes to pay the bonds, the constitutional provision does not apply. We may regret that the town of Winamac can not issue bonds to rebuild its school-house, but we can not escape the force of the strong and plain provision of our organic law.

A taxpayer may maintain injunction to prevent the issue of corporate bonds without authority. There is no other remedy of equal power and efficiency, and the case, therefore, comes within the rule declared in such cases as *Watson v. Sutherland*, 5 Wall. 74; *Denny v. Denny*, 113 Ind. 22; *Bishop v. Moorman*, 98 Ind. 1, and the cases there cited.

Judgment affirmed.

Filed July 1, 1892.

La Rosae v. The State.

No. 16,643.

LA ROSAE v. THE STATE.

CRIMINAL LAW.—Seduction.—Evidence.—Sufficiency of to Warrant a Conviction.—In a criminal action for seduction, the only evidence introduced to corroborate the testimony of the prosecutrix was the testimony given by Charles Simon, of a conversation with the appellant, in which the appellant said: "That Ella was a good girl, and he expected to make her Mrs. La Rosae."

Held, that the evidence of the prosecutrix was not sufficiently corroborated to authorize a conviction under section 1807, R. S. 1881.

From the Noble Circuit Court.

L. H. Wrigley, for appellant.

L. D. Fleming, Prosecuting Attorney, and *H. C. Peterson*, for the State.

MILLER, J.—The appellant was prosecuted and convicted for the seduction of a female of good repute for chastity and under the age of twenty-one years.

The sufficiency of the evidence to sustain the verdict of the jury is the only question presented by the record.

The point made by counsel for appellant is that the evidence of the prosecutrix is not corroborated in accordance with the provision of section 1807, R. S. 1881, which is as follows:

"In prosecutions for seduction, and for enticing and taking away a female for the purposes of prostitution, the evidence of the female must be corroborated to the extent required as to the principal witness in cases of perjury."

Several witnesses were placed upon the stand to show the good repute of the prosecuting witness for chastity, but the only evidence introduced to corroborate the testimony of the prosecutrix, is contained in the evidence given by Charles Simon, of a conversation with the appellant on the street, about the 20th of December, 1891, in which appellant said "that Ella was a good girl and he expected to make her Mrs. La Rosae."

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Assuming that this evidence tends to corroborate the testimony of the prosecutrix, that her seduction was accomplished under promise of marriage, the question arises whether a corroboration of her testimony as to one of the material elements necessary to make up the crime, is a sufficient compliance with the requirements of the statute above cited.

So far as we have been able to discover, this statute has never been judicially construed by the courts of this State, but provisions bearing more or less similarity have been, not infrequently, before the courts in other jurisdictions, and we are therefore not without the assistance afforded by adjudged cases.

The statute of Minnesota provides that "No conviction shall be had under the provisions of this section on the testimony of the female seduced, unsupported by other evidence."

In construing this statute in *State v. Timmens*, 4 Minn. 325 (332), the court said:

"A conviction can not be had under this statute upon the testimony of the woman seduced unless she is corroborated upon every material point necessary to the perfection of the offence, to wit: the promise to marry, the seduction under such promise, and the previous chaste character of the party seduced."

This case was cited with approval in *State v. Brinkhaus*, 34 Minn. 285.

In New York the statute declared that "No conviction shall be had on the testimony of the female seduced, unsupported by other evidence."

In *Kenyon v. People*, 26 N. Y. 203, the court held that no corroboration was necessary upon the points that she was an unmarried female of previous chaste character, saying, "It was only necessary that she should be supported by direct evidence or proof of circumstances, as

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to the facts constituting the crime. These were the promise and the intercourse."

This construction was adhered to in the subsequent cases of *Armstrong v. People*, 70 N. Y. 38; and *People v. Plath*, 100 N. Y. 590.

In North Carolina the statute provides that "The unsupported testimony of the woman shall not be sufficient to convict."

In *State v. Ferguson*, 107 N. C. 841, the trial court instructed the jury that criminal seduction was made up of three ingredients: (1) There must be the act of sexual intercourse. (2) The act must be committed under promise of marriage. (3) The woman must be in the character of an innocent woman; and that if the prosecutrix was supported as to the truth of the existence of any one of these ingredients the case was brought within the provisions of the act.

This instruction was held to be erroneous, the court saying, in substance, that supporting proof of some of the ingredients was not sufficient to sustain prosecution. The defendant admitted the act of sexual intercourse, but this was decided not to be a sufficient corroboration.

The statute of New Jersey provides that in such cases, "the evidence of the female must be corroborated to the extent required in case of indictment for perjury."

In *Zabriskie v. State*, 43 N. J. (Law) 640, the court held that in order to warrant a conviction under this statute the following facts must appear:

"1. The defendant must be a single man over the age of eighteen.

"2. The female must be a single woman.

"3. She must be under the age of twenty-one.

"4. She must be of good repute for chastity.

"5. The sexual intercourse must have been had under a promise of marriage.

"6. She must thereby become pregnant.

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"7. The evidence of the female must be corroborated to the extent required in case of indictment for perjury."

In the course of the opinion the court said :

"Error is also assigned upon the charge of the court to the jury as to the necessary corroboration of the prosecutrix.

"Our statute requires that the evidence of the female shall be corroborated to the extent required in case of indictment for perjury.

"The test of the correctness of the charge will be, whether the matter submitted to the jury as corroborated in this case would be sufficient, with the oath of the female, to convict the defendant of perjury in swearing that there was not a promise of marriage.

"Formerly, it required the testimony of two witnesses to convict of perjury, but the rule has been so far relaxed as to permit a conviction upon the oath of one witness supported by proof of strong corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence.

"A larger measure of corroboration is requisite than that which is essential to support the testimony of an accomplice against his confederates in crime; something more than the mere weight of evidence in favor of the State.

"Such evidence will satisfy the New York statute, which simply requires the evidence of the female to be supported. *Kenyon v. People*, 26 N. Y. 204; *Boyce v. People*, 55 N. Y. 644.

"Our statute is manifestly intended to be more exacting."

The court also says :

"If it be said that this interpretation of the statute will render it difficult to convict, the answer is that the framer of the act did not insert this clause as to corroboration for the purpose of making conviction easy."

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The statute under which this case was decided is so similar to our own, so far as it relates to the question before us, as to make the case very much in point.

In accordance with what we regard as the overwhelming weight of authority, we hold that the evidence of the prosecutrix was not sufficiently corroborated to sustain a conviction.

The judgment is reversed with instructions to grant the defendant a new trial, and for further proceedings in accordance with this opinion.

Filed Sept. 16, 1892.

No. 15,949.

EWING ET AL. v. WILSON ET AL.

TRUST.—Undue Influence.—Revocation.—Consideration.—Parol Evidence.—Bona Fide Purchaser.—A young man between twenty-two and twenty-three years of age, without business experience or knowledge, intemperate in his habits, unmarried, and easily influenced by those in whom he had confidence, was induced by his father, a man of large wealth, great ability and force of character, and who possessed a commanding influence over his son, to convey to him for a consideration named in the deed of \$600 (no actual consideration being paid), all his property of the estimated value of \$50,000 in trust for himself for life, remainder to his personal representatives. Afterwards the father reconveyed the property to the son, and he in turn conveyed the land in dispute—a portion of that originally conveyed to the father—to *bona fide* purchasers. The son died and his legal representatives claim title to the land.

Held, that they had no title that equity would enforce, the deed to the father being unconscionable, and the reconveyance to the son being simply what in equity and good conscience it was the father's duty to do.

Held, also, that the reconveyance showed that the trustee intended that the trust should be temporary, and that it was an exposition of the contract by the contracting parties themselves, and entitled to weight.

Held, also, that the provisions in the deed declaring where the property

132	223
132	206
132	600
132	223
145	114
132	223
149	2
149	7
149	8
149	9
149	431
151	386
132	223
155	427

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should go in case of the donor's death, did not make the son's voluntary deed irrevocable, the facts showing that the conveyance was executed for a temporary purpose, and that the grantee, recognizing the fact that the purpose had been accomplished, reconveyed the property to the donor.

Held, also, that the purchasers from the son had a right to assume that there was *prima facie* a valid reason for the conveyance and a consideration for it.

Held, also, that it was competent to prove by parol the want of actual consideration and the circumstances surrounding the execution of the deed.

From the Cass Circuit Court.

J. C. Nelson, Q. A. Myers and R. E. Pendarvis, for appellants.

D. D. Dykeman, W. T. Wilson and M. Winfield, for appellees.

ELLIOTT, C. J.—The appellants claim title to real estate, and base their claim upon a deed executed to George W. Ewing, senior, by George W. Ewing, junior. The deed is the same as that which received consideration in the cases of *Ewing v. Jones*, 130 Ind. 247; *Ewing v. Lutz*, 131 Ind. 361, and other cases. The decisions in those cases conclusively settle the questions arising upon the instrument itself, but they go no further; on the contrary, as the opinions in those cases expressly declare, the court confined its decision to the language of the deed, considered without reference to extrinsic facts. In this case questions very different from those presented in the cases referred to require consideration and decision. In the case before us the appellees filed a cross-complaint, asserting title and praying that it be quieted in them, and the court made a special finding. The questions we are required to consider and decide arise on the special finding, for the ascertainment and declaration of the principles applicable to the facts stated in the finding, necessarily involve and dispose of all the incidental questions presented by the ruling denying a new trial.

The special finding sets forth various conveyances, and,

among others, the deed of George W. Ewing, junior, to George W. Ewing, senior, and also the deeds executed by the latter reconveying the land to the former. Those deeds are sufficiently set forth or referred to in *Ewing v. Jones, supra*, and we do not deem it necessary to again copy them or to give a more particular statement of their contents. We copy from the finding the trial court's statement of the facts connected with the execution of the conveyance first mentioned: "That said George W. Ewing, second, was born July 20th, 1841, and was at the time of the execution of the deed between twenty-two and twenty-three years of age and had just attained his majority, that he had been in the army and had no business experience or knowledge; that he was intemperate in his habits, unmarried, and easily influenced by those in whom he had confidence, and was particularly under the influence and control of George W. Ewing, senior, his father, the grantee in said deed; that said deed described and included all of the estate, real and personal, of which George W. Ewing, second, was at the time possessed of; that the property so conveyed was of the value of fifty thousand dollars; that George W. Ewing, senior, grantee and trustee named in said deed, was the father of George W. Ewing, second, was a man of great wealth—more than two millions of dollars—of large experience in business matters, great ability and force of character, and generally carrying things his own way with persons connected with him; that he had a commanding influence over his son, said George W. Ewing, second; that the deed of trust of December, 1863, was executed by George W. Ewing, second, in compliance with the suggestion and at the dictation of George W. Ewing, senior; that the consideration of six hundred dollars named in the deed was nominal and was never in fact paid as recited in said deed, but only advanced out of the future income of the trust property, and in an accounting had later it was accounted for out of said income; that at the time

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the deed was executed and for the purpose of keeping him out of the army the grantee in said deed had directed the grantor to go to California, and the grantor had agreed to go; that both grantor and grantee, in executing said deed, understood that it should be temporary only, and that on the son's return from his visit, or as soon as he desired, its powers should be revoked, but, meantime, his father in acting under said deed should manage the property and create an income therefrom; that said deed was prepared at the instance of the grantee, George W. Ewing, senior, by William Lytle and Bynum D. Minor, his confidential bookkeepers, both of whom were devoted to his interests and controlled by his wishes; no professional counsel was present or consulted."

The controlling question in this case is as to the effect of the trust deed executed by Ewing, the son, to Ewing, the father, as read by the light of the circumstances attending its execution, and as interpreted by the subsequent acts of the grantor and the grantee. The light from these sources falls fully upon the case before us, but it was entirely absent from the case as made by the record in *Ewing v. Jones, supra*. The great rule, we may say at the outset, for the construction of instruments is to discover and execute the intention of the contracting parties. In this instance it is our duty to ascertain, if we can, the intention of the parties, and, if our quest results successfully, give the intention full effect. The general question may be thus stated. Did Ewing, the son, intend to part with all dominion over his property and vest it irrevocably in Ewing, the father, and did the deed of trust as read by the light of attendant facts and the settled principles of equity jurisprudence, have the effect to completely divest the grantor of all his property? If this was the intention of the parties and the effect of the deed, it must stand as written; if it was not, the reconveyance of the senior Ewing was effective, and the appeal must fail.

It is too well settled to admit of controversy that parol

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evidence is competent for the purpose of proving fraud or mistake. Equity will relieve upon parol evidence, and in cases similar in their general features to the present courts have often reformed instruments such as the one before us. *Willan v. Willan*, 16 Vesey, 72; *Wiser v. Blachly*, 1 Johns. Ch. 607; *Quick v. Stuyvesant*, 2 Paige, 84; *Coles v. Bowne*, 10 Paige, 526; *Firmstone v. DeCamp*, 17 N. J. Eq. 309; *Ketselbrack v. Livingston*, 4 Johns. Ch. 144. It is an elementary rule that parol evidence is competent to prove the consideration of a deed, and a rule of like elementary character is, that parol evidence is admissible even where there is no fraud or mistake to show facts surrounding the execution of an instrument. It is, therefore, no objection to the special finding before us that it contains facts resting on parol as well as matters embodied in written instruments. It would not be an effective objection in ordinary cases, and it is even less effective in such a case as this, in view of the facts attending the execution of the deed, the confidential relation of the parties, and the nature of the transaction.

Conspicuous among the facts is the absence of consideration. It is now known to us that the trust deed was without consideration. If, therefore, Ewing, the son, irrevocably parted with his property, he did it because it was his intention to make an absolute and unalterable gift. If this was his intention, Ewing, the father, took as the trustee of donees, who had yielded no consideration. Neither is the trustee a *bona fide* purchaser, nor are the beneficiaries purchasers for value, and hence they have no rights as purchasers of that class. The trustee is, indeed, constructively if not actually, a *mala fide* donee, for the means by which he secured the execution of the deed, the advantage he took of the confidential relations existing between him and his son, the use he made of his influence, and the agents he employed to secure an instrument fitting his purpose strip him of the vestments of a donee in good faith. There was undue use of confidential relation, and there was resort to extraordinary

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means. The end attained was unconscionable, for a transaction which takes from a man all his property without consideration is not commendable or just, unless there was full knowledge and entire and unfettered freedom of thought and action.

The authorities fully warrant the conclusion that a court of equity will not enforce an instrument executed under such circumstances as was the one before us, in favor of the active procurer of its execution. *Ashton v. Thompson*, 32 Minn. 25; *Miskey's Appeal*, 107 Pa. St. 611; *Bainbrigge v. Browne* 18 L. R. Ch. D. 188; *Berdoe v. Dawson*, 34 Beav. 603; *Miller v. Simonds*, 72 Mo. 669; *Wood v. Rabe*, 96 N. Y. 414. In *Miller v. Simonds*, *supra*, the child was of full age, but it was held in a well reasoned opinion that the gift was ineffective, because of the undue influence which the kinship between father and child gave the former. Gifts procured by a parent from a child are regarded with stern eyes by the courts of equity, and are not upheld if there are circumstances indicating their unconscionable character, or showing the use of an undue or improper influence. *Garvin v. Williams*, 44 Mo. 465; *Street v. Goss*, 62 Mo. 226. In the case last cited it was said, in speaking of a gift by a kinswoman to a kinsman: "There exists, therefore, no necessity to show fraud, or imposition practiced on him who bestows the confidence; but simply to show that, during the pendency of such intimate relations, the conveyance in question was made. This being done, all the above mentioned consequences as to the *onus* of proof attend the given transaction as inevitable incidents."

The existence of a confidential relation, as has long been settled, subjects all gifts to suspicion, and they can be rescued from condemnation only by evidence establishing good faith, full knowledge of consequences and of the facts. Here we have not only the relationship, but we have also the influence flowing from it and the means resorted to for the purpose of effectuating the grantee's design. It is not necessary in such

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cases that there should be actual fraud ; wicked intent may be absent and yet the transaction be ineffective. In addition to the extrinsic facts (the absence of consideration, the nature of the transaction, and the object of the actor, whose mind dictated all that was done and whose influence controlled), we have the peculiar nature of the instrument itself. Of the provisions of the instrument and the effect given them by the law, we shall presently speak in detail, so that it is enough for our immediate purpose to say that they are of a character to which the law attaches a meaning and force not tending to support such a gift as that which is needed to make the asserted trust effective. It seems quite clear to our minds that the trustee when he reconveyed the property to the creator of the trust did simply what in equity and good conscience it was his duty to do. This is not so simply because of the extrinsic facts to which we have adverted,—although they would be sufficient as we believe to create the duty,—but because of the fact that the effect of the deed was, as the finding declares, intended to be temporary. The reconveyance is significant. It is significant as showing that the trustee intended that the trust should be temporary, and as showing that it was the right of the donor to have his property restored to him. Nor is this its only, or, indeed, its chief significance. It has a deeper meaning and more potent significance. It is an exposition of the contract by the contracting parties themselves, and they best knew what their intention was, and what they believed their contract to mean. Such an exposition is of weight. *Louisville, etc., R. W. Co. v. Reynolds*, 118 Ind. 170 (173) ; *Vinton v. Baldwin*, 95 Ind. 433, and cases cited ; *Reissner v. Oxley*, 80 Ind. 580 ; *Johnson v. Gibson*, 78 Ind. 282, and authorities cited ; *Chicago v. Sheldon*, 9 Wall. 50. If the controversy were waged between the trustee and the creator of the trust, there would, every one must see, be no debatable question, for the trustee's rights, if any he ever had, are irretrievably gone. Gone, not simply because he reconveyed, but because

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by his acts and conduct he has given a construction to the contract which sweeps away every vestige and shadow of right. But the antecedent facts combine with the subsequent, and all conspire with irresistible power to prove that he never had any right to irrevocably deprive the author of the trust of his property.

We assume with undoubting confidence that the trustee never acquired a permanent and indefeasible right to the donor's property, and that when he executed the deed reconveying the property he did what it was his plain duty to do. Neither in strict law nor in broad justice had the trustee a right to the property. To every enlightened mind it must, we venture to affirm, be clear that in equity and good conscience the donor was always the owner of the land. The legal title was transiently out of him for a definite purpose, but the equitable ownership was never irrevocably surrendered. If it be true that in equity the donor never lost his property, it must also be true that his descendants never acquired that which he had sold during life to *bona fide* purchasers, such as the appellees. If it be true, as true it is, that the donor never parted with the property, the result must necessarily be that there was no particular estate in the first taker nor any absolute estate in expectancy in the remainderman. We are not without authority upon this point, although the question seems so plain upon principle that authority is not required. In *Miller v. Simonds*, *supra*, the court said: "And it is well settled that the undue influence need not proceed from the recipient of the ward's or donor's bounty, but it is equally fatal to the validity of the gift that such influence was exerted by a third person. *Ranken v. Patton*, 65 Mo. 378; *Ford v. Hennessey*, 70 Mo. 580." But the doctrine may well be placed on broader grounds. It is an ancient maxim, and a wise one, that "Fraud vitiates everything." So that the fraud of the procurer of the deed, whether actual or implied, poisoned it from beginning to end. It is a fundamental principle, worthy of the rank of a maxim, that

"What fraud creates equity will destroy." If therefore, fraud created the deed from Ewing, the son, to Ewing, the father, equity will destroy it. If the fraud vitiated or destroyed the original deed, neither the trustees nor the donees of the declared estate in remainder can base title upon it nor take rights from its provisions. We regard it as clear that the appellants have shown no enforceable title, and without title a recovery by them is legally impossible.

Our conclusion that the appellants ought not, and can not, wrest the land in controversy from the appellees will be strengthened by a consideration of the provisions of the deed of Ewing, junior, to Ewing, senior, in connection with the extrinsic facts, and we shall now consider the provisions of the instrument somewhat in detail in conjunction with the facts attending its execution. We know that it recites a consideration, but we know, also, that the recital is not true, and, knowing this, know that it evidences a mere voluntary gift. We know that during life the beneficial interest is declared to be in the author of the gift, so that he did not even professedly part with all interest. As to this interest it is clear that the trust was revocable and was revoked by the conveyance made by the trustee to the donor, so that there can be no question except such as affects the persons to whom the deed professed to convey an estate in remainder. But the reservation of the interest in the subject of the gift is not without influence upon the rights of those persons, for this provision, considered in connection with the absence from the deed of a power of revocation, is one of controlling importance. The rule as it has long existed, and as affirmed by the courts of England and America is, that: where there is a voluntary gift of the entire estate of the donor, a reservation of the principal beneficial interest by him and no power of revocation, the instrument will be held ineffective as against its author, unless it appears that there was an intention to make the donation irrevocable. In a note to *Garnsey v. Mundy*, 13 Am. Law Reg. 345 (354),

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Mr. Bispham fully and ably reviews the authorities, and states one of the conclusions which they establish in these words: "But where the deliberate intent to make a gift does not appear, and where no motive for such a gift is shown, the absence of a power of revocation is *prima facie* an evidence of a mistake. The rule is the same when the motive has failed." This is a guarded statement of the rule, for many of the authorities warrant a stronger statement. Bispham Eq. 107, and note; *Aylsworth v. Whitcomb*, 12 R. I. 298; *Angell, Pet.*, 13 R. I. 630. Here, as in the first of the cases cited, it appears that the parties did not intend that the deed should be irrevocable, but here that intention was unequivocally manifested by a reconveyance. The fact that a reconveyance was made is indicative of the belief of the parties that the donation was not irrevocable.

It can not be said that the provision in the deed of trust limiting a remainder to the legal representatives of the donor is so strong as to override all other facts, and, despite the facts, control the instrument. Unexplained or uncontrolled that provision, written in a deed founded upon a valuable consideration, does carry an estate in remainder, and is an indication of an intention to create an irrevocable gift. But it is not such a clear and decisive manifestation of an intention to create an irrevocable gift as to make all other things yield to it. The provision may, with entire propriety, be given effect, and yet it be held that no irrevocable gift was created. It is quite consistent with the theory that the deed of trust is revocable to adjudge that the donor did therein provide for the disposition of the property remaining after his death. He knew, as did his trustee, that he might die before the revocation of the deed, and it was reasonable and natural to make provision for such a contingency. If the deed had limited the duration of the trust to a very short time—a year, or even a week—it would have been entirely consistent to have written in the instrument a provision declaring to whom the property

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should go in the event of the death of the donor while the deed remained unrevoked. In the light of the circumstances under which the deed was written it was prudent to make provision for the disposition of the property in case of the death of the donor before the termination of the declared temporary trust, and hence that provision can not be regarded as clearly evincing an intention to make a gift that could never be revoked. There is, in truth, not the slightest reason for asserting, even in ordinary cases, that a provision declaring where property shall go in case a donor dies necessarily makes a voluntary deed irrevocable. It is, at all events, very clear that such a provision can not control where, as here, the facts show that the conveyance was executed for a temporary purpose, and that the grantee, recognizing the fact that the purpose had been accomplished, reconveyed the property to the donor.

At the time the deed of trust was executed the appellants had no claim whatever to the land in controversy, for Ewing, the son, was then unmarried, but the appellees are *bona fide* purchasers in all that the term implies, unless the deed of trust irrevocably took the property from the donor. The appellants have paid no value, and all the claim, or color of claim, they have, or can have, is founded on the voluntary gift of their ancestor, and they are not in a situation to successfully contend against the strong equities of the appellees. These equities the extrinsic facts make evident, and they can not be disregarded. The appellees bought upon the faith of a deed executed by the trustee to the donor, and that deed was sufficient, at least, to warrant the belief that the immediate parties to the original deed regarded it as a revocable conveyance, so that the appellees did not buy recklessly or negligently. They were neither volunteers nor negligent buyers. They had a right to assume that there was, *prima facie*, a valid reason for the reconveyance and a consideration for it, for the reason that the trustee did what it was his duty to do and the donor received back what he had a right to take.

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We do not say, nor mean to say, that the appellees could hold the property if there were no facts exhibited showing the real nature of the transaction, but we do say without hesitation that, in view of the facts under which the original deed was executed the deed reconveying the land was rightfully executed, is effective and should stand. Equity regards as done that which ought to have been done, and upon the facts here disclosed equity would unquestionably have decreed a cancellation of the trust deed had the donor invoked its aid against the trustee. *Wollaston v. Tribe*, 9 L. R. Eq. 44; *Hall v. Hall*, 14 L. R. 365; *Russell's Appeal*, 75 Pa. St. 269; *Case v. Case*, 26 Mich. 49; *Houghton v. Houghton*, 15 Beav. 278; *In re Gangwere's Estate*, 14 Pa. St. 419; *Cooke v. Lamotte*, 15 Beav. 234. *Huguenin v. Baseley*, 14 Vesey, 293; *Phillipson v. Kerry*, 32 Beav. 628; *Nanney v. Williams*, 22 Beav. 452; *Phillips v. Mullings*, 7 Ch. App. 244; *Forshaw v. Welsby*, 30 Beav. 243; We can not comment upon the cases to which we have referred in detail, nor is it necessary that we should do so, for the doctrine which they sustain is accurately stated in *Coutts v. Acworth*, L. R. 8 Eq. 558, where it was said: "The party taking a benefit under a voluntary settlement or gift, containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable. And, where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of the solicitor to insist upon the insertion of such power, and the want of it will in general be fatal to the deed." The case before us is, indeed, stronger than any of those cited, here there was no solicitor, here there was no professional counsel, here no means were afforded the donor to acquire knowledge of the effect of his deed of gift, it was here far otherwise, here confidential agents of the trustee drew the deed, here the trustee was a man of affairs and experience, and the donor young and unacquainted with business affairs, and here, too, the

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intention was not to execute an irrevocable deed of gift. This intention seems to have been mutual for it was carried into effect by a reconveyance, but if the intention to make an irrevocable gift had not existed in the mind of the donor the deed was revocable and was revoked, completely and forever, by the reconveyance to the author of the conditional or inchoate gift. If the donor did not intend to make an unalterable gift, none was made, no matter what may have been the purpose of the trustee or that of his book-keepers who drew the deed. The case is all the stronger because the facts indicate that both the donor and his trustee intended that the trust should be revocable, but it would be strong enough to effectually defeat the appellants if the donor, only, had intended to make an incomplete and not an absolute disposition of his property. It would, indeed, have been strong enough to effect that result if it had not affirmatively appeared that the donor did not intend to create such a gift, for, in the absence of proof of such an intention, the presumption in such a case as this would be that he reserved the power of revocation.

The case is with the appellees upon the broad principles of natural justice and upon the decisions of the courts.

Judgment affirmed.

Filed April 27, 1892; petition for a rehearing overruled Sept. 17, 1892.

No. 15,594.

HAXTON ET AL. v. MCCLAREN.

TRUST AND TRUSTEE.—*Conversion of Trust.*—*Election as to Remedies by Beneficiary.*—When a son received notes from his father for certain specified uses and purposes, he to proceed at once to collect the notes and pay part of the proceeds to the plaintiff, the donor's daughter, and the son accepted the trust, but repudiated it before it had been fully executed

132	235
136	339
132	235
138	224
132	235
140	465
149	488
143	704
132	235
160	642
160	643

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and before his father's death, and being appointed one of the executors of his father's will, turned over to the estate the trust property in his hands, the plaintiff could either follow the fund or proceed against the trustee. The trust property did not constitute a part of the father's estate.

SAME.—Evidence.—Assessment Lists of Trustee.—The assessment lists of the trustee during the period it was claimed that he had collected part of the trust fund and converted it to his own use, and showing an increase in his personal property, were admissible in evidence as tending to show that he had collected and converted said fund.

SAME.—Evidence.—The recognition by the plaintiff of the validity of her father's will, which was dated before the trust, would not preclude her from claiming the trust property. The will only operated on property owned by the father at his death.

SAME.—Hearsay Evidence.—Suppression of Correspondence.—It was claimed that the father had complained that the son had suppressed correspondence between him and the plaintiff. The son offered to show in rebuttal that he had told his daughter to write all letters which her grandfather might wish, but there was no offer to show that the grandfather knew of this; neither was it claimed that the daughter was present.

Held, that the evidence, even if material, was hearsay, and properly excluded.

SAME.—Complaint.—Suit Against Trustee Individually and as Executor.—When the trustee was sued in his individual capacity and also as executor, for the purpose of enjoining a distribution of the fund under the will, and the complaint proceeded on the theory that the fund was a trust fund, and did not belong to the estate, it was not error to refuse to render judgment against him as executor.

SAME.—Trustee's Unsoundness of Mind.—Conversations With Him.—Opinion of Witness.—Harmless Error.—The defendants claimed that the father at the time of the creation of the trust was a person of unsound mind. A witness who was introduced to support this claim testified to many conversations she had with the father, as well as to many remarks she had heard him make, tending to show the condition of his mind. On cross-examination she was asked: "What did you hear him say imputing that any one had stolen his tobacco?" and she answered, "I never heard him say anything imputing stealing."

Held, that the question did not call for the witness' opinion of the language used by the father.

Held, also, that the answer was of such a character as to show conclusively that the defendants were not harmed either by the question or answer.

SAME.—Judgment Against Debtor to Trust Fund.—When, in addition to the judgment against the trustee, a judgment was sought against a party for the amount claimed to be due from him to the trust fund, and there was nothing in the verdict or in any finding of the court fixing the

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amount, there was nothing upon which to base a judgment, even if the plaintiff was entitled to this relief.

JUDGMENT.—*Harmless Erroneous Instruction.*—A judgment will not be reversed on account of an erroneous instruction which does not injuriously affect the rights of the party complaining.

From the Owen Circuit Court.

I. N. Fowler and *W. A. Pickens*, for appellants.

W. Hickam and *D. E. Beem*, for appellee.

COFFEY, J.—This was an action in the Owen Circuit Court by the appellee against appellants, John Haxton and Alexander Haxton, in their individual capacity and as executors of the last will of Richard Haxton, deceased, to enforce the provisions of an alleged trust. The complaint alleges substantially that Rebecca McClaren, John Haxton and Alexander C. Haxton are the children of Richard Haxton, now deceased; that on the 10th day of January, 1883, Richard Haxton had money and notes amounting to \$4,000; that the notes were executed to him by his son, John Haxton; that they were then due, and drawing 8 per cent. interest; that said Richard, desiring and intending to make a final disposition of his said property, and to part with his title thereto, transferred and delivered the same to appellant Alexander C. Haxton, for the following uses and purposes, to wit: Said Alexander C. was to proceed at once to collect all of said notes; that out of the proceeds he should pay to appellee, Rebecca McClaren, the sum of \$1,000, and appropriate to his own use and benefit a like amount, pay over to each of five named grandchildren \$25, and out of the remainder of said money pay to said Richard, from time to time, as necessity might require, and expend for his benefit, such sums as said Richard might need for his reasonable personal expenses, outside of his general support, for which other provision had been made, and whatever balance of said money should remain in the hands of said Alexander at the death of said Richard, after complying with the provis-

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ions aforesaid, should be equally divided between said Alexander C. and said Rebecca; that said John, being present when said arrangement was made, consented thereto and agreed to pay said notes to said Alexander C. for said uses; that said Alexander C., for himself and on behalf of this plaintiff, being authorized by her so to do, accepted said notes and money from said Richard, took the same into his possession, and agreed to comply with the above conditions; that thereafter said Alexander collected of said notes a large sum, to wit: \$2,500, being more than enough to pay the beneficiaries their several amounts; that in part performance of his trust, he paid to the plaintiff \$190 and to each of three of the grandchildren \$25, to wit: Sabina Haag, Louisa Dack and Charles McClaren; that on the 17th day of August, 1888, said Richard died; that before said Richard's death, to wit, in January, 1884, Alexander repudiated his said trust, and, though often requested, failed and refused to pay to the plaintiff any further sum out of the said money; that at the death of said Richard, said Alexander had remaining in his hands of said fund the sum of \$3,000 and also one of the notes of said John, which had been turned over by said Richard, on which there was due \$1,200; that said John and Alexander, contriving further to defeat said trust, after the death of said Richard, to wit: on the 26th day of October, 1888, having been appointed executors of a pretended will of said Richard, purporting to bear date March 2d, 1874, proceeded to make an inventory, and included therein all the notes and money remaining in the hands of said Alexander, which had been so transferred to him by said Richard; that they, as executors aforesaid, are treating said trust funds as belonging to the estate of said Richard, and are proceeding to distribute the same under the provisions of said will, by which the whole thereof would be given to other beneficiaries.

Upon this complaint the appellee prayed that the appellants be required to file a full exhibit of the assets, both as

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to money and notes belonging to the trust therein named; that the appellant Alexander be required to make a full exhibit of the receipts and disbursements of the trust property; that the appellees have judgment against the appellant Alexander for the balance of the \$1,000 first to be paid her under the trust, with the interest thereon, and that she have judgment against him for one-half the amount of the remaining trust fund; that judgment be rendered against the appellant John for any sum due from him on the notes belonging to the trust, to be disposed of and divided as the court might direct under the terms of the trust, and the appellants be enjoined from disposing of the trust funds as executors of the will of Richard Haxton and for general relief.

To this complaint the appellants answered, among other things, that at the time of the creation of the pretended trust named in the complaint, Richard Haxton was a person of unsound mind, and for that reason incapable of contracting.

A trial of the cause by jury resulted in a joint verdict against both the appellants for the sum of seventeen hundred and sixty-three dollars and fifty-nine cents, upon which the court, over a motion for a new trial, rendered judgment.

It is earnestly insisted by the appellants that the circuit court erred in overruling their demurrer to the complaint. It is contended that the complaint is fatally defective, because it fails to allege that Richard Haxton left no widow; that the children and grandchildren are entitled to this property, or that there are no debts due from his estate; and in support of their contention they cite *State, ex rel., v. Sanders*, 90 Ind. 421, *Mitchell v. Dickson*, 53 Ind. 110, *Walpole v. Bishop*, 31 Ind. 156, and many other cases of similar import.

The argument proceeds upon the assumption that the property in controversy belonged to the estate of Richard Haxton, and if this assumption is true, of course, the objection is well taken. We are met, therefore, at the beginning of the investigation, with the question as to whether the transaction alleged in the complaint created a valid trust, and had the

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effect of divesting the title of Richard Haxton to the property, a portion of which the appellee seeks to recover.

If the title of Richard Haxton was divested and became vested in Alexander Haxton, as trustee, the property does not belong to the estate, and the allegations necessary to recover property in a suit by an heir, in the absence of administration, are wholly unnecessary.

A trust in personal property may be created by parol. In the absence of a statute, as the owner of personal property has entire control of it, he may sell and convey it by parol, or he may transfer it for such uses and trusts as he may desire in the same manner. If a trust is once created and accepted it can not be altered or changed either by the donor or the trustee without the consent of the beneficiary. Nor, if executed, can it be revoked without the consent of the *cestui que trust*. If the trust is perfectly created, the donor or seller having nothing more to do, the person seeking to enforce it having need of no further action on the part of the donor, nothing being required of the court but to give effect to the trust, it will be carried into effect at the suit of a party interested although it was without consideration. Perry Trusts, sections 86-98; *Garrigus v. Burnett*, 9 Ind. 528; *Hunt v. Elliott*, 80 Ind. 245; *Mallett v. Page*, 8 Ind. 364; *Hon v. Hon*, 70 Ind. 135; *Mohn v. Mohn*, 112 Ind. 285; *Ewing v. Jones*, 130 Ind. 247.

In this case the trust was completely executed. Richard Haxton made a complete transfer of the property to his son Alexander, one of the appellants here, who accepted it upon the trust stipulated in the agreement, so that nothing remains for the court except to enforce the trust according to the terms of the agreement made at the time the trust was created. By transferring the property to the trustee Richard Haxton divested himself of title, and it became vested in the trustee. By this act Richard lost control of the property, and as the trust, so far as he had power over it, was executed, he had no power to revoke it. It is true that one thousand dollars

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was charged with certain personal expenses of Richard, but that fact does not, in our opinion, affect what remained of that sum after the payment of such expenses.

It follows from what we have said that the fund now in controversy did not belong to Richard Haxton at the time of his death, and constitutes no part of his estate. For this reason the complaint is not subject to the objections urged against it.

It is insisted by the appellants that the verdict of the jury is not sustained by the evidence, and that the damage assessed is too large.

In passing upon these questions it becomes necessary to consider the allegations in the complaint, as they apply to each appellant separately. The complaint as to Alexander C. Haxton proceeds upon the theory that the appellee is entitled to recover from him, as trustee, her portion of the trust fund therein described. As to John Haxton, the complaint proceeds upon the theory that the appellee is entitled to have judgment against him for the amount due from him to the trust fund, to be paid into court for future distribution. It will thus be seen that the cause of action stated against the appellants is not joint, but several.

If the appellee, therefore, was entitled to recover at all it was upon the theory outlined in the complaint, and as every action must proceed from beginning to end upon some single definite theory, we must examine the evidence in the light of the facts alleged in the complaint.

The evidence on behalf of the appellee tends to prove that Richard Haxton, in the month of January, 1883, delivered to the appellant Alexander C. Haxton certain promissory notes executed to him by John Haxton, with an agreement, made at the time, that the notes should be collected at once, and that out of the proceeds Alexander should retain one thousand dollars for his own use, and should pay over to the appellee one thousand dollars. It was also agreed that Alex-

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ander should retain one thousand dollars and pay whatever personal expenses Richard should incur during his life, and at his death, if any portion of this sum remained unexpended, it should be equally divided between Alexander and the appellee. The appellants and the appellee are the only children of Richard Haxton. In part performance of the trust Alexander paid the appellee the sum of one hundred and ninety dollars, but having discovered a will executed by Richard Haxton, which made a different disposition of his property, he refused to pay her any further sums. At the death of Richard Haxton, which occurred in the year 1888, the appellants probated this will and turned the trust fund over to the estate. They being the executors of the will, made an inventory of the trust fund and charged themselves with it as executors. The inventory, which consists principally, if not entirely, of the trust fund, amounted to \$3,-821.67.

The evidence on behalf of the appellants tended to prove that no such trust as that claimed by the appellee was ever created, and that at the time of its alleged creation Richard Haxton was a person of unsound mind, and incapable of contracting.

The jury, however, believed the evidence introduced by the appellee and found, not only that the trust was created as alleged in the complaint, but also that Richard Haxton was at the time of sound mind. Of course we are not expected to disturb this finding, as there was evidence tending to support it, and we must, for this reason, treat the case throughout as one in which the trust was created under the terms and limitations fixed by the agreement between the parties at the time of its creation.

Under the terms of that agreement it was the duty of Alexander C. Haxton to collect the notes turned over to him by his father, Richard Haxton, and pay his sister, the appellee, one thousand dollars of the proceeds. It was his further duty, as such trustee, to pay over to her, upon the

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death of Richard, her portion of the one thousand dollars not expended during his life. In violation of these duties he repudiated the trust during the life of his father, and upon his death divested himself of the title and control of the fund as trustee by transferring it to the executors of the will of Richard Haxton. It is true the appellee might have followed the fund in the hands of the executors, but she was not bound to do so. By divesting himself of title to the trust property and vesting the title in another, Alexander C. Haxton rendered himself personally liable to the appellee, and she had her election to either follow the property or proceed against him personally. Perry Trusts, sections 828, 843; *Pearson v. Moreland*, 45 Am. Dec. 319; *Garrigus v. Burnett*, *supra*; *Kinloch v. I'On*, 26 Am. Dec. 196.

Taking the inventory made by the appellants as executors of the will of Richard Haxton, as representing the true amount of the trust fund on hand at the time of his death, and it certainly tends to prove that fact, the damages assessed by the jury are not excessive. We are unable to say that the verdict of the jury is not supported by the evidence, or that there was error in the amount of the recovery.

On the trial of the cause the appellants propounded to one Marietta McIndo, a witness called on their behalf, the following question:

"State to the jury what, if anything, John Haxton, your father, ever said to you with reference to writing any or all letters or other writing for your grandfather, Richard Haxton, which he, your grandfather, might request you to write?" To this question the court sustained an objection.

There was evidence introduced by the appellee tending to prove Richard Haxton had complained that correspondence between him and the appellee had been suppressed by the appellants. As rebutting this evidence, they sought to prove by an answer to the above question that the appellant John Haxton had told the witness to write any and all letters that her grandfather, Richard Haxton, might request

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her to write. There was no offer to prove that Richard Haxton was present at the conversation or that he ever had any knowledge of it, and it is not claimed that the appellee was present. The whole inquiry was remote from the material issue between the parties. It is difficult to perceive how the fact that the appellants did or did not suppress correspondence between Richard Haxton and the appellee could throw any light upon the question as to whether the trust set up in the complaint existed, or as to whether Alexander Haxton, the trustee, was liable to account to the appellee for trust funds. But aside from its remoteness the matter sought to be elicited was, we think, hearsay. It consisted of a conversation between one of the appellants and the witness, in the absence of the appellee, and could not bind her. If the trust did in fact exist, nothing that could be said or done, either by Richard Haxton or the appellants, or all of them together, in her absence or without her consent, could, in the least, affect her rights under the trust. We do not think the court erred in sustaining an objection to this question.

The appellee was permitted, by the court, to read in evidence to the jury the assessment lists of the appellant Alexander C. Haxton, for the years 1879 to 1886.

It was contended by the appellee that Alexander had collected at least a portion of the money due on the notes delivered to him by his father, Richard Haxton, in trust, and had converted the same to his own use. These assessment lists were introduced by the appellee to prove that during the period which they covered, his personal property had greatly increased, from which she claimed the inference arose that he had collected the money on the notes held in trust and included it in his individual taxable property.

The objection made to this evidence is as to its strength and not as to its admissibility.

It was certainly admissible for the purpose for which it was offered, but its weight was for the jury.

The appellants called, as a witness, Sarah Medaris, by

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whom they sought to prove that at the time of the creation of the trust in question Richard Haxton was a person of unsound mind.

On her examination in chief she testified to many conversations she had had with him, as well as to many remarks she had heard him make, tending to show the condition of his mind, and upon cross-examination the appellee put to the witness the following question: "What did you hear him say imputing that any one had stolen his tobacco?"

To this question the appellants objected upon the ground, as stated to the court at the time, that the question asked the witness to put a construction upon the language of Richard Haxton and interpret to the jury what his words and language meant, and to give an opinion in that regard; and that the answer thereto, if the question were answered, would only be the expression of an opinion of the witness, and that the question and answer thereby sought to be elicited are an invasion of the province of the jury.

The witness answered: "I never heard him say anything imputing stealing."

Whatever else may be said of this question, it is certainly not subject to the objection made against it. It calls for the language of Richard Haxton upon a particular subject, and not for the witness' opinion of the language. Moreover, the answer was of such a character as to show conclusively that the appellants were not harmed either by the question or answer.

The appellants introduced in evidence the papers and record in an action brought by them in the Owen Circuit Court, as executors of the will of Richard Haxton, against his heirs and legatees to construe such will. To that action the appellee was a party, and filed an answer consisting of the general denial.

Upon the subject of this record the appellants asked the court to instruct the jury, in substance:

1st. That if she appeared and defended against that action

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and interpose no objection to the execution of the will by the executors after the same should be construed by the court, that such fact might be considered, in connection with all the other facts and circumstances in the case, in determining whether or not she and the defendants were recognizing the will and acting upon its provisions.

2d. That if she appeared to that action and interposed no objection to the execution of the will, and the disposition of the property therein bequeathed as provided thereby when construed by the court, such fact was proper to be considered, in connection with all the facts and circumstances in the case, in determining whether or not any such arrangement, agreement or contract, as alleged in the complaint for the distribution of the property and estate of Richard Haxton, deceased, was ever made.

The will of Richard Haxton, a construction of which was sought by the appellants as executors, bears date long anterior to the creation of the trust set up in the complaint. We have been unable to perceive any connection between the suit to construe that will and the matters involved in this suit. The appellee does not now deny the validity of the will.

She claims, in this suit, that the property in controversy does not belong to the estate of Richard Haxton, and, therefore, it is not affected by the will. The controversy here is over the existence of the trust set up in the complaint, and the will of Richard Haxton and its construction could not, by any possibility, throw any light upon that controversy. Nor does the fact, if it be a fact, that the appellants and appellee all recognize the validity of that will, and have no objection to its provisions, affect the question before us, for it can only operate upon property owned by Richard Haxton at the time of his death.

The question as to whether the trust now in controversy did, or did not, exist, was in no sense involved in the action of the appellants, as executors, to construe the will of Rich-

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ard Haxton. For these reasons there was no error committed by the court, in our opinion, in refusing these instructions.

We think instruction numbered nine, given by the court to the jury, states the law correctly, and that it is not open to the criticism to which it is subjected by counsel for the appellants in their brief.

The court was in error when it instructed the jury that the appellants had jointly answered the complaint, when in fact their answers were several, but such error could not possibly prejudice the rights of the appellants.

A judgment will not be reversed on account of an erroneous instruction which does not injuriously affect the rights of the party complaining. *Perry v. Makemson*, 103 Ind. 300; *Wolfe v. Pugh*, 101 Ind. 293; section 658, R. S. 1881.

Nor did the court err in refusing to render judgment against the appellants in their capacity as executors of the will of Richard Haxton. The complaint proceeds upon the theory that they are liable individually, and they were made parties in their fiduciary capacity for the sole purpose of obtaining an injunction against them to prevent a distribution of the funds in controversy amongst those entitled to share under the will. There is nothing in the complaint upon which a money judgment against them as executors could be based, for the whole theory of the complaint is that this fund does not belong to the estate, but is a trust fund held by Alexander C. Haxton at the time of Richard Haxton's death for the use of the appellee and others.

We have gone carefully over all the questions presented for our consideration by the appellants, and find no error for which the judgment as to Alexander C. Haxton should be reversed.

But the judgment as to John Haxton can not stand. As we have seen, the complaint as to him proceeds upon the theory that the appellee was entitled to a judgment against him for the amount due from him to the trust fund.

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Assuming, without deciding, that the appellee was entitled to this relief, there is nothing in the verdict, or in any finding of the court fixing that amount.

Without such a verdict or finding there was nothing upon which to base a judgment. The liability of the appellants, as disclosed by the complaint, as we have said, is several, and not joint. To authorize a judgment against John Haxton there should have been a separate finding as to the amount due from him to the trust.

Judgment affirmed as to the appellant Alexander C. Haxton, and reversed as to appellant John Haxton, with directions to grant a new trial as to him.

Filed April 23, 1892; petition for a rehearing overruled Sept. 16, 1892.

 No. 16,442.

TURNER, SHERIFF, v. CONKEY.

CHANGE OF VENUE.—*Collateral Attack on Judgment for Refusal to Grant.*—A judgment can not be successfully attacked collaterally for a wrongful refusal to grant a change of venue. The judgment is not void.

HABEAS CORPUS.—*Review of Magistrate's Decision Holding Prisoner in Custody.*—If the committing magistrate has jurisdiction to order a person accused of crime into custody, a writ of *habeas corpus* will not issue to secure his release.

SAME.—*Collateral Attack on Justice's Judgment.*—The judgment of a justice of the peace holding a prisoner in custody for trial can not be assailed upon a petition for a writ of *habeas corpus*. *Smelser v. Lockhart*, 97 Ind. 315, overruled.

From the Lake Circuit Court.

W. C. McMahan, for appellant.

W. B. Reading, for appellee.

ELLIOTT, J.—The appellant prosecutes this appeal from a judgment rendered upon a petition for a *habeas corpus* filed

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139	274

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149	343

139	248
149	558
152	578

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155	389
156	39
156	40

132	248
157	89

132	248
159	687

132	248
163	407

132	248
169	666

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by the appellee. The material facts stated in the petition are, in substance, these: The petitioner was arrested upon a charge of felony, and taken before a justice of the peace for a preliminary hearing. The justice of the peace overruled a motion for a change of justices, and, upon a hearing, decided against the petitioner, and required him to give bail to answer the charge preferred against him. The petitioner failed to give bond, and he was committed to the custody of the appellant, who is the sheriff of Lake county. The appellant unsuccessfully moved to quash the writ, and reserved proper exceptions.

We may say, at the outset, that we do not deem it necessary to decide the question as to the right of an accused to have a change of justices in such a case as this, and we direct our decision to other questions.

The petition charges that the restraint is illegal because of the refusal of the justice to grant the change asked by the petitioner. The question presented is one of jurisdiction. If the filing of the affidavit and the request for the change completely defeated jurisdiction, the commitment was void, and the petitioner entitled to the writ. If, however, there was jurisdiction, the petitioner was not entitled to the writ, no matter how flagrant or palpable the error of the justice of the peace in denying the change for which the petitioner applied. The rule everywhere prevailing is that if there is jurisdiction to adjudge a petitioner to the custody from which he seeks to be released, the writ will not issue. *Holderman v. Thompson*, 105 Ind. 112; *Lowery v. Howard*, 103 Ind. 440; *Smith v. Hess*, 91 Ind. 424; *In re Luis Oteizay Cortes*, 136 U. S. 330; *Stevens v. Fuller*, 136 U. S. 468; *People, ex rel., v. Liscomb*, 60 N. Y. 559 (19 Am. R. 211); *Ex parte Miller*, 82 Cal. 454. In the case of *Willis v. Bayles*, 105 Ind. 363, this general doctrine was applied to the judgment of a justice of the peace. The cases of *In re Luis Oteizay Cortes*, *supra*, *Stevens v. Fuller*, *supra*, involved the validity of proceedings before a United States commissioner,

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and the general rule we have stated was approved and enforced. In the cases of *People, ex rel., v. St. Dominick*, 34 Hun, 463, *Bennac v. People*, 4 Barb. 31, and other cases cited in the first named case, the judgments called in question were those of inferior statutory tribunals.

If the judgment indirectly assailed by the petition had been a final one, there could be no doubt that if there was jurisdiction to enter it the assault would fail, since, as the cases all agree, where the inferior tribunal has jurisdiction, its judgments can not be collaterally assailed. We can conceive no reason why a different rule should apply to a case where the authority of the inferior tribunal is to hold an accused to bail and in default of bail commit him to the custody of the proper officer of the law. It can make no difference so far as the mere question of holding in custody is concerned whether the judgment is a final one entered upon a regular trial or is a judgment rendered upon a preliminary examination, for if there is power to give the judgment directing the restraint the judgment can not be void.

The statute invests justices of the peace with general authority to conduct preliminary examinations and to recognize accused persons to the court clothed with criminal jurisdiction. The authority is extended over a general subject, and in this instance the assumption of jurisdiction was legal, and there was no judgment beyond that jurisdiction; that is, there was no excess of jurisdiction. Our decisions affirm that where there is general jurisdiction of a subject, although that jurisdiction is vested in an inferior tribunal, there can be no collateral attack. *Jackson v. Smith*, 120 Ind. 520, and cases cited; *Alexander v. Gill*, 130 Ind. 485. *Chicago, etc., R. W. Co. v. Sutton*, 130 Ind. 405, and cases cited. See, also, authorities cited in Elliott's App. Proc. sections 501, 503. The presence of authority to proceed in the particular case is jurisdiction. Elliott's App. Proc. sections 12, 499. The record in the case before us shows that there was power to proceed, for the law invested the inferior trib-

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unal with authority over the class of cases to which the case of the petitioner belongs. As there was such authority, the tribunal was empowered to decide all questions that arose in the particular case, and that power is not affected by the correctness or the incorrectness of the decisions. *Snelson v. State*, 16 Ind. 29. See authorities cited in Elliott's Appellate Procedure, section 715, n. 3. As the sufficiency of an affidavit for a change of venue, as well as the question as to the time of filing and the like, are questions of procedure, it seems clear that such questions must be decided by the tribunal which rightfully entered upon the hearing of the case, and that whether such questions are rightly or wrongly decided does not affect the question of jurisdiction. A wrong decision may constitute error, but it does not destroy jurisdiction. It is quite clear that the refusal of a judge of a superior court to call in another judge does not destroy jurisdiction, although it may be a palpable wrong entitling the injured party to relief in a direct attack. There is no valid reason why the same rule should not apply to an inferior tribunal invested with authority over the general class of cases of which the particular case is a member. Mischievous consequences must necessarily result from the doctrine that a refusal to grant a change of justices, or of venue, takes away all jurisdiction and makes the proceeding void. If there is no jurisdiction, and the proceedings become absolutely void, then the officers would be liable to a civil action. This would be especially unjust to the ministerial officer who executed the process, and unjust to the judicial officer who errs in denying the application. In the case of *State, ex rel., v. Wolever*, 127 Ind. 306, the principle that where there is jurisdiction of a class of cases vested in any judicial tribunal, superior or inferior, the judgment is not void, although there may be a palpable error in denying an application for a change of venue, is laid down, and that is the principle which underlies the case we have in hand. It is proper to say of the opinion in that case that it is apparent that the

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change of venue, or a plea to his jurisdiction or the like, that it is his imperative duty to do what the law requires, yet if he does not do what it is his duty to do jurisdiction is not affected, provided, of course, it once fully attached. The duty in *McLaughlin v. Etchison*, *supra*, was even more clearly imperative than it was in this, and yet it was held, in accordance with the authorities, that the judgment of the justice of the peace could not be successfully assailed by an application for a writ of *habeas corpus*. But we need not particularize the cases which oppose *Smelzer v. Lookhart*, *supra*, for it is enough to affirm that it is contrary to all our well considered cases upon the subject of collateral attack. It has been in effect, although not in direct terms, overruled by more recent decisions.

Judgment reversed.

Filed Sept. 17, 1892.

 No. 16,574.

CONRAD v. THE STATE.

CRIMINAL LAW.—Alibi.—Instructions.—Reasonable Doubt of Accused's Presence at Place of Crime at a Particular Time.—In a prosecution for larceny, where the prosecuting witness has testified that the property was stolen on a certain night, it is not error to refuse an instruction to the effect that if the jury have a reasonable doubt, from the evidence, whether or not the accused was at the place of the crime on such night they must acquit.

SAME.—Defining Alibi.—It is not error to refuse to give the jury a definition of "alibi."

SAME.—Jury Considering, Instructions.—Other Crimes.—In determining a defendant's guilt or innocence, the jury can not consider the commission of other crimes by him; but it is not error to refuse to instruct the jury that they should not consider any act of the accused, which he has testified to, and which they believe to be wrong.

SAME.—Reputation of Accused for Veracity.—Neighborhood Reports.—If a man's neighbors generally say nothing about his truthfulness that fact

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of itself may be evidence that his general reputation for truth is good; and whether or not he has such a reputation is a question for the jury.

From the Jasper Circuit Court.

S. P. Thompson, for appellant.

J. T. Brown, for the State.

OLDS, J.—The appellant, Joseph Conrad, was jointly indicted with one Sherman Cooper for larceny, and was tried and convicted.

The questions presented arise upon the ruling of the court in overruling the motion for a new trial, and relate to the sufficiency of the evidence and the giving and refusal to give instructions. No good can be accomplished by a discussion of the evidence. The evidence of the witnesses was conflicting, and there was impeaching evidence as to the character of several witnesses, but there was sufficient evidence tending to establish the guilt of the appellant to support the verdict of guilty.

The defendant sought to establish an *alibi*, and upon this subject the defendant requested the court to give the following instruction :

“4. If the jury, taking into consideration all the evidence, have a reasonable doubt as to whether the defendant was at the house of James Comer on the night of May 11th, 1891, the night said Comer claimed the meat was taken, the jury should find him not guilty.”

The court refused to give the instruction, and counsel for the appellant claims that it is applicable to the evidence, and should have been given, and that the court gave no instruction covering the same point.

In instruction No. 5, given by the court, the jury is instructed that “An *alibi* is a legitimate and proper defence in a criminal action, and is to be judged by the jury as any other defence, by the evidence, and if the evidence thereof raises a reasonable doubt as to defendant’s guilt in the mind of any juror, such juror should not vote to convict the defendant.”

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The instruction given by the court, we think, covers the proposition contained in the instruction refused, and more properly expresses the law. Indeed, we do not wish to be understood as holding that the instruction refused should have been given even if the court had not given instruction numbered five, for the instruction requested states that the defendant should not be found guilty if he was not at the house of Comer on the night of a certain date, the time when Comer claims the meat was taken. To make proof of his absence a good defence it must have raised a reasonable doubt as to his presence at the premises on the night the larceny was in fact committed, and not relate to a time when some witness, although it be the prosecuting witness, claimed the property was taken. A juror may have reasonable doubt as to whether a larceny was committed on a particular date, testified to by the witnesses, and yet have no doubt as to the fact that the defendant did actually commit the larceny. The date is only material as showing it to have been committed within the time for which there may be a conviction. It is a matter about which there is much more liability to be mistaken than there is in regard to the fact that goods were taken ; but it is not necessary to determine whether the instruction requested correctly stated the law or not, for as we construe it the instruction given correctly stated the law relating to the *alibi* sought to be proven. It is contended that the word *alibi* is technical, and that its meaning was probably not grasped by the jury.

We think this is no valid reason for the giving of the instruction refused. The word is clearly defined in the dictionaries, and has been in common use in connection with the criminal law for ages, and certainly a juror sitting in a criminal case in which an *alibi* was sought to be proven, as one of the principal defences, would fully grasp and comprehend the meaning of the word when used by the court in an instruction.

The court gave instruction numbered six, requested by coun-

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sel for the appellant, relating to circumstantial evidence, and then, on its own motion, gave instruction numbered three, relating to the same subject, and objection is made to some parts of instruction numbered three. We have examined this instruction, and do not regard it as objectionable. It tells the jury that the existence of any fact may be established by circumstantial evidence, and that a conviction may be had on evidence entirely circumstantial, but that each fact necessary to a conviction must be proven beyond a reasonable doubt; that it is not necessary to produce on the minds of the jury an absolute certainty of the defendant's guilt, but if his guilt is established beyond a reasonable doubt it is sufficient, and that a reasonable doubt is a doubt having a foundation in reason. If any more explicit definition of what constituted a reasonable doubt was desired on the part of the appellant, he should have requested it.

The court refused to give instruction No. 10, requested by counsel for appellant, which is as follows: "10. The defendant has testified in this case, and his testimony is to be received and weighed by the jury as the testimony of any other witness. If the defendant, in his testimony, has stated any act of his own which the jury believe to be wrong, or should any crime have been mentioned by other witnesses as imputed to the defendant, other than the matter in the indictment, no juror should consider such testimony for the purpose of punishing the defendant for the crime here charged, nor must the jurors talk about it in the jury room for any such purpose, but free your minds from any such thing, and not permit it to prejudice or bias the judgment against the cause of the defendant. All such evidence is only proper to be considered in determining the weight and credibility of defendant's own testimony; such evidence, if any, of other matters, apply to the defendant as a witness, and not otherwise." Had the defendant requested the giving of an instruction, expressed in proper language, to the

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effect that the admission, or evidence of the commission of other crimes should not be considered as establishing the commission of the crime charged by the defendant, but that such evidence was only admissible, and to be considered as affecting the credibility of the defendant, and the weight to be given to his testimony, it should have been given, but the instruction requested is too broad in its terms, and was liable to mislead the jury. It states in general terms that his testimony is to be received and weighed as that of any other witness, and if he has stated any act of his own which the jury believe to be wrong, it should not be considered by any juror for the purpose of punishing the defendant for the crime charged. This general statement is not limited to any wrong act other than such as are connected with the crime charged, and is broad enough to include a wrongful act relating to and tending to establish the commission of the crime charged to have been committed by the defendant, and this statement we do not think is limited so as to not have a tendency to mislead the jury. They are further told they are to free their minds from such evidence, and not permit it to prejudice or bias the juror's judgment against the cause of the defendant. These general statements are too broad, and the instruction was properly refused. We are cited by counsel for appellant to *Boyle v. State*, 105 Ind. 469, as supporting the theory that the instruction was improperly refused. The instruction refused is substantially the same as, if not in the main a literal copy of, the one given in that case, but all that is decided in that case is that the giving of the instruction was not error of which the appellant could avail himself for a reversal of the judgment, and with that we agree. The instruction is too favorable to the defendant, and could not harm him, and he would have no reason to complain of the giving of such instruction.

Objection is made to the modification of instructions 8 and 12. We have examined these instructions, and regard the modifications as proper. Another instruction

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stating that "if a man's neighbors generally say he is untruthful that makes his general reputation for truth bad; but if, on the other hand, a man's neighbors generally say nothing about his truthfulness that fact of itself is evidence that his general reputation for truth is good," was requested and the court modified the latter clause, making it read, "that fact of itself may be evidence that his general reputation for truth is good. Whether it is or not is a question solely for the jury."

This change we regard as a proper modification. There may be circumstances under which there was no occasion for his neighbors to speak or some reason for their silence, although the reputation of the person may be bad and it is matter for the jury to determine what weight shall be given to such testimony, and the instruction more properly expressed the law by changing it to read "that fact of itself may be evidence," this it did as originally drafted and the court very properly added the words "whether it is or not is a question solely for the jury." We do not regard the views we have expressed in conflict with the decision in the case of *Davis v. Foster*, 68 Ind. 238, cited by counsel.

Counsel complains of the ruling of the court in refusing to permit a certain letter to go in evidence. The letter is set out in the bill of exceptions in connection with the affidavit for a new trial. We are not referred to any such preliminary evidence as entitled the letter to go in evidence, and furthermore we are not referred to any portion of the record containing any offer on the part of the appellant to put the letter in evidence.

There is no error in the record.

Judgment affirmed.

Filed Sept. 22, 1892.

The State v. Bercaw.

No. 16,555.

THE STATE v. BERCAW.

APPEAL.—*Questions Arising on Trial.*—*How Presented.*—Questions arising on the trial, and not on the pleadings, must, on appeal, be presented by a bill of exceptions.

BILL OF EXCEPTIONS.—*Stenographer's Report.*—*How Made a Part of the Record.*—When a stenographer's report is brought into the transcript by the clerk it is not a bill of exceptions. Such a report, to be a part of the record, must be properly embodied in a bill of exceptions.

From the Boone Circuit Court.

H. P. New, Prosecuting Attorney, *J. Claybaugh*, *C. S. Wesner* and *D. S. Holman*, for the State.

ELLIOTT, J.—The State seeks a decision of questions arising on the trial of the case in the court below, but there is no bill of exceptions in the record. It seems quite clear that where the questions arise on the trial and not upon the pleadings, there must be a bill of exceptions showing the rulings and the exceptions of the State. *Elliott's App. Proc.*, sections 276, 280. The stenographer's report of the evidence brought into the transcript by the clerk is not a bill of exceptions. Such a report is not part of the record unless it is properly embodied in a bill of exceptions signed by the judge. See authorities cited in *Elliott's App. Proc.*, sections 821, 822.

Judgment affirmed.

Filed Sept. 16, 1892.

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162	437

No. 16,441.

CLAYPOOL ET AL. v. THE BOARD OF SCHOOL COMMISSIONERS OF INDIANAPOLIS ET AL.

SPECIFIC PERFORMANCE.—*Mortgage Securing Bonds.*—*Agreement to Convey in Satisfaction of.*—A. contracted to convey to the City of Indianapolis certain lots, to "be perfect and free from liens and encumbrances," except a certain mortgage securing \$60,000 of bonds and the interest coupons thereto attached, due in ten years. A. agreed to put on the lots \$14,000 worth of improvements. The city agreed to pay \$3,000 rent per annum until the bonds were due, "by taking up the said interest coupons on said bonds as they mature." The city did not assume or agree to pay the mortgage, but if it did its title was thereby to become perfect, and if it paid off the mortgage before maturity, the rent was to terminate from the time of such payment, and all unmatured bonds were to be cancelled and surrendered with the principal bonds. If the city failed to pay off the principal bonds at or before maturity, then it was to convey the lots to the mortgagees free from any encumbrances put on the lots by it. The bonds were executed on the day this contract was executed, and three days later the mortgage to secure them was executed, as well as a warranty deed from A. to the city. A. completed the improvements, and the city took possession. On the maturity of the bonds their assignee demanded from the city a conveyance of the lots to himself, and also demanded of the mortgagees that they bring an action to enforce the specific performance of the contract, which they both declined to do.

Held, that the assignee of the bonds was entitled to a decree of specific performance against the city, compelling it to convey the lots to him.

SAME.—*Hardship.*—*Unforeseen Event.*—A court of equity will not decree a specific performance, as a rule, if there is a hardship and inequality in the contract, or where unforeseen events, over which the parties had no control, have subsequently occurred which would render such a decree a great hardship.

SAME.—*Contract for Third Person.*—*Acceptance.*—*Right to Enforce.*—A person for whose benefit a contract has been made can maintain an action upon it for a specific performance thereof, by accepting its terms.

From the Marion Circuit Court.

S. Claypool and *J. W. Claypool*, for appellants.

J. S. Duncan and *C. W. Smith*, for appellees.

COFFEY, J.—On the 19th day of March, 1880, the appel-

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lant Elijah S. Alvord and the board of school commissioners of the city of Indianapolis, entered into the following written agreement, viz. :

“Memorandum of agreement by and between Elijah S. Alvord, of the first part, and the board of school commissioners of the city of Indianapolis of the second part, all of the city of Indianapolis, Marion county, Indiana, *Witnesseth* : That whereas the said party of the second part is desirous to procure suitable offices and rooms for the use and accommodation of said board, and the use and accommodation of the public library of said city, it is, therefore, agreed by and between the parties of the first and second part as follows :

“*First.* The said party of the first part agrees to convey to the city of Indianapolis, for the use of the public schools of said city, on or before the 1st day of September next, by warranty deed, in which the wife of said party of the first part shall join, lots five (5) and six (6), in square forty-five (45), in the city of Indianapolis, Marion county, Indiana, said title to said lots shall be perfect and free from liens and encumbrances except a mortgage to the Thames Loan and Trust Company of Norwich, Connecticut, and S. A. Fletcher & Co., of the city of Indianapolis, Indiana, securing the payment of sixty thousand dollars (\$60,000) in bonds of \$5,000 each, with five per cent. (5) interest coupons attached ; said principal bonds payable in ten years after the 1st day of January, 1881, and dated the 19th day of March, 1880, bearing 5 per cent. interest from the 1st day of January, 1881, payable semi-annually ; each bond having twenty interest coupons attached, and each for the sum of one hundred and twenty-five (\$125) dollars, the first maturing the 1st day of July, 1881, and on every six months thereafter ; said bonds and coupons being payable at Fletcher’s Bank, Indianapolis, Indiana, and said mortgage and bonds and coupons executed by the party of the first part.

“*Second.* Said party of the first part agrees to make last-

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ing and valuable improvements on said property between now and the 1st day of next September that will cost at least fourteen thousand (\$14,000) dollars, and said improvements to be made according to the plans and specifications made by C. A. Wallingford, architect, and submitted to and accepted by said party of the second part. * * *

"Third. The said party of the second part agrees to pay rent for said property the sum of three thousand (\$3,000) dollars per annum for the term of ten years from the 1st day of January, 1881, which rent shall be paid by taking up the said interest coupons on said bonds as they mature. And shall also keep said property in repair, natural wear and tear and unavoidable accidents excepted, and shall keep an insurance of at least fifteen thousand (\$15,000) dollars upon said property for the benefit of said mortgagees.

"Fourth. The said party of the first part shall give the possession of said property, with the improvements completed, on or before the 1st day of September, and no compensation is to be paid for its use from the time the possession is given to the 1st day of January, 1881, other than is provided by the last clause of article third (3) of this contract—that is to say the insurance shall cover that period.

"Fifth. The party of the second part does not assume or agree to pay said mortgage, but if it does its title shall thereby become perfect, and if it should pay off said mortgage before maturity, the rent provided for in this contract shall terminate from the time of such payment, and all unmatured coupons shall be cancelled and surrendered with the principal bonds.

"Sixth. If the party of the second part shall fail to pay off said principal bonds at or before maturity, then said party of the second part shall convey said property to the mortgagees aforesaid free from any encumbrances put on it by the said party of the second part."

On the day of the date of this contract Alvord executed to the Thames Loan and Trust Company, and to S. A. Fletcher & Co. the bonds and coupons described therein,

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and on the 24th day of the same month he and his wife joined in a mortgage upon the real estate therein described to secure the payment of said bonds and coupons.

On the day the mortgage was executed Alvord and his wife conveyed the property to the appellee by warranty deed for the nominal consideration of one dollar. Alvord completed the improvements contemplated by the contract prior to the first of September, 1880, and surrendered possession to the board of school commissioners of the city of Indianapolis.

The board of school commissioners took possession of the property on the 1st day of September, 1880, and have ever since continued in the possession of the same, and paid all of the coupons attached to the bonds described in the contract, but have never paid any part of the bonds. Long prior to their maturity the bonds were assigned to the appellant Edward F. Claypool, who is now the owner of the same.

After the maturity of the bonds, viz.: on the 8th day of January, 1891, the appellant Claypool demanded of the board of school commissioners a conveyance of the property described in the contract in satisfaction of the bonds and mortgage so held by him, which conveyance it declined to execute. He also demanded of the mortgagees that they bring an action to enforce the specific performance of the contract, which they declined to do.

This action was brought by the appellant Edward F. Claypool in the Marion Circuit Court to enforce the specific performance of the contract above set out, to which action the appellant Alvord was made a party defendant. Alvord filed a cross complaint in which he prayed that the contract might be specifically performed and that he be relieved from personal liability on the bonds. The case was tried by the court who found, as shown by the special findings in the case, in addition to the facts above stated, that there was due on the bonds at the time of the trial the sum of \$62,173.20 and the further sum of \$3,000.00 for attorney's fees; that at the

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maturity of the bonds the board of school commissioners was unable to pay the bonds for want of funds; that the current expenses of the schools of the city practically consumed the entire amount, which can be produced by levying the full amount of taxes by the law permitted to be levied by it; that since the maturity of the bonds and since the demand for a conveyance, as above stated, the board of school commissioners has effected a contract of sale of the property, conditioned upon the appellant Claypool's releasing it from the contract and mortgage, by the terms of which contract the full amount due on the bonds is to be paid and the remainder of the purchase price paid to the board of school commissioners, but Claypool declines to release his mortgage and asserts that the board has no right to make such sale, but Claypool was never informed of such sale at any time before this suit was instituted. The appellant Claypool brought the bonds and mortgage into court for cancellation upon condition of receiving a conveyance and a decree quieting his title.

Upon the foregoing facts the court stated as conclusions of law:

First. That the appellant Claypool was entitled to a personal judgment against the appellant Alvord for the amount of the bonds described in the contract above set out, and the attorney's fees thereon, and to a decree foreclosing his mortgage as to all of the defendants named in the complaint.

Second. That the board of school commissioners of the city of Indianapolis was the owner of the equity of redemption of the property in controversy, and was entitled to redeem the same from a sale under the decree within one year from the date of such sale.

Thereupon the court rendered a personal judgment against Alvord for the sum of \$65,173.31, and entered the ordinary decree of foreclosure.

It is conceded that all the instruments of writing above referred to are parts of one transaction, and for that reason

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are to be treated as constituting but one instrument to be construed as a whole. When so treated and construed we think there is but little difficulty in arriving at the intention of the parties.

The deed of conveyance executed by Alvord and wife, if taken alone, would indicate an intention to vest in the appellee an absolute unconditional fee to the real estate in controversy, but when construed with the contract, which constitutes a part of it, it is clear, we think, that no such intention existed. The payment of rent is wholly inconsistent with such an intention, for we can not conceive of the absolute unconditional owner in fee becoming his own tenant. The payment of rent, however, is consistent with the intention of the parties to vest the title in the appellee for the use of the parties named in the contract, subject to the option of the appellee to become the absolute owner of the property by paying the mortgage debt described in the contract at or before its maturity. The deed and contract did vest in the appellee the use of the property for a period of ten years upon the payment of an annual rent of three thousand dollars, and they also vested in it the fee to the land for the use of the mortgagees, provided the appellee did not choose to exercise the option given it to become the absolute owner by paying the mortgage debt within the time stipulated. We have not deemed it necessary to inquire whether the language used in the several instruments is to be treated as creating conditions subsequent, or whether it is to be construed in the light of a covenant, as, in our opinion, the result is the same in either event. It is agreed that by the terms of the contract between the appellee and Alvord the appellee refused to assume the mortgage debt therein described, and expressly agreed that in the event it did not pay off such debt at or before it became due, it would convey the mortgaged premises to the mortgagees, and that it has not paid, and refuses to convey. Of course it is not the province of the courts to make contracts for parties, but it is

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their duty to render such judgments and decrees as will effectually execute contracts when made, unless there is some legal reason for a refusal to do so.

This brings us to a consideration of the argument urged by counsel for the appellee, in their able brief, against the contention of the appellant that the court erred in refusing to decree specific performance in this case on the facts as stated in the special findings. It is contended by the appellee that the circuit court should not have decreed specific performance of the contract—

First. Because the maxim, "Once a mortgage always a mortgage," applies to the case made by the facts as found by the court.

Second. Because a court of equity will never decree specific performance when there is a hardship and inequality in the contract, or, if the contract was fair when executed, subsequent events have occurred which render such a decree a hardship on one of the parties, and that under the facts in this case it would be unconscionable to decree specific performance.

Third. Because the appellants have an adequate remedy at law, and that a court of equity will not decree specific performance where such remedy exists.

Fourth. Because a court of equity will not decree specific performance of a contract in favor of one party in a case where the opposite party is not entitled to a like decree, and inasmuch as the appellee could not compel the mortgagees to take the property in satisfaction of the mortgage debt, they can not compel a conveyance for that purpose.

We will consider these objections in the order in which they are presented.

The maxim, "Once a mortgage always a mortgage," is in accord with the well-known rule that the mortgagor can not renounce or surrender his privilege of redemption beforehand or in the mortgage. The reason for the rule is that the necessities of such mortgagor may have driven him to

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make ruinous concessions in order to raise the money secured by his mortgage. Jones Mortgages, section 251.

At common law the legal title was vested in the mortgagee, and was forfeited upon default, but equity established the right of redemption after default. Equity, however, did not attempt to alter the legal effect of the forfeiture which followed a breach of the condition, but it regarded it as a penalty, against which the mortgagor should be relieved upon payment of the debt secured by the mortgage. In order that the mortgagor should in no event lose his equity of redemption, the maxim above quoted was adopted by the courts of equity. But we are unable to perceive what application the maxim has to the case now before us. There is here no contract between the mortgagor and mortgagees whereby the mortgagor has agreed to convey the mortgaged premises in satisfaction of the mortgage. The facts here present a case where the mortgagor is insisting that the mortgaged premises shall be applied to the satisfaction of a debt for which he is personally liable, in strict accordance with an agreement made between him and a third person to whom the property has been conveyed for that purpose.

The question is not one as to whether the mortgage executed by Alvord and wife is still a mortgage, but the question is, shall the appellee be compelled to perform its agreement with Alvord to pay the mortgage by a conveyance of the land, and thus relieve him from personal liability? Had there been an agreement between the mortgagor and mortgagees, whereby the land was to be conveyed to the mortgagees in payment of the mortgage debt, and the land had been conveyed to the appellee without special agreement under such circumstances as that the appellee had acquired all the rights in the land possessed by the mortgagor, then, as against the mortgagee, the maxim would apply.

But such is not the case presented by the record. We have a case in which the mortgagor is insisting that his liability shall be extinguished with the mortgaged premises

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under a solemn covenant made with him by the appellee to the effect that it should be so extinguished. Under such a state of fact we do not think the appellee can shield itself under this maxim to the injury of the mortgagor, whose debt it agreed to extinguish by a conveyance of the land.

It is undoubtedly true that a court of equity has much discretion in the matter of decreeing specific performance, but such discretion is bounded by well defined and well understood rules. It will not decree such performance, as a rule, where there is a hardship and inequality in the contract or where unforeseen events, over which the parties had no control, have subsequently occurred which would render such a decree a great hardship. *Pomeroy Specific Performance*, sections 177, 183 and 185; *Randolph v. Quidnick*, 135 U. S. 457.

And this leads us to inquire what equities, if any, the respective parties to this controversy present for our consideration.

If the appellee were here ready and willing, and was proposing to pay off and discharge the mortgage debt, the appellant Claypool would have no equity, for ordinarily a mortgagee is entitled to nothing more than the debt which the mortgage secures. The appellee's claim is wholly without equity, for it has not invested a dollar in the property which is the subject of this suit. It has occupied the property for ten years, and has paid the agreed rent and nothing more.

The appellee stands in the attitude of holding on to property in which it has not invested a cent, and repudiating its solemn agreement upon the alleged ground that it can sell it for enough to pay the mortgage and have a surplus.

The case with Alvord, however, is quite different. He comes here with substantial equities. If there is any one thing more plain than another in the transaction we are investigating, it is that Alvord was seeking to shield himself from personal liability on account of the bonds he was exe-

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cuting to the mortgagees. When the appellee refused to assume the payment of the debt, we have no reason to believe that Alvord would have conveyed to it the property in controversy, had it not been for its express agreement to shield him from liability by either electing to pay the mortgage debt in cash at or before its maturity, or by conveying to the mortgagees the property in satisfaction of the debt. To deny his application now for specific performance leaves him wholly without any adequate remedy for a breach of the contract between him and the appellee. By its refusal to comply with the contract the appellant Claypool has been enabled to take a personal judgment against him for more than sixty-five thousand dollars, the very thing which the contract was intended to prevent. Furthermore, the principal debt has been increased three thousand dollars by the addition of attorney's fees. It is no excuse to say that the property is of sufficient value to pay this enormous judgment, for we know that property does not always bring its full value at forced sale. Should the property mortgaged fail to sell on the decree rendered in this case for a sum sufficient to pay this debt, then the mortgagor, Alvord, if he has other property subject to execution, is at the mercy of the mortgagee, and this by reason of the refusal of the appellee to keep its agreement with him. If his property is levied upon and sold for the payment of the balance due, what remedy has he against the appellee? It has never agreed to pay the debt otherwise than by a conveyance of the property.

The finding of the court in relation to a contract made by the appellee for a sale of the property is too vague and uncertain to aid the appellee in this case. From the finding we know nothing as to the pecuniary ability of the party with whom it is made. We are not informed as to whether it is verbal or written, or of such a nature as to be enforceable, or whether the remainder after the payment of the

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mortgage, even if it is complied with, will be one dollar or five hundred dollars.

To aid the appellee on the ground that time is not of the essence of the contract between it and Alvord, it should be in a condition now to pay the debt and prevent a personal judgment against him, or it should at least tender such security for his indemnity as would leave no reason to doubt that he is secure from loss. *Sanborn v. Woodman*, 5 Cush. 36; *Hancock v. Carlston*, 6 Gray, 39.

In our opinion the equity is with Alvord, and not with the appellee. It would not be a hardship upon the appellee to enforce specific performance of its contract, but it would be a hardship upon the appellant Alvord to refuse it.

We have already answered the objection that the parties have an adequate remedy at law. In our opinion the appellant Alvord has no adequate remedy outside of the specific performance of the contract made with him by the appellee, by which it agreed to convey to the mortgagees the property in controversy in satisfaction of the mortgage. The appellee does not suggest any other tangible means of relieving him of his personal liability on the bonds which he executed to the mortgagees.

It is ordinarily true that the right to specific performance must be mutual between the parties to the contract, and that such mutuality must exist at the time the contract is made, but the rule is by no means of universal application. *Vassault v. Edwards*, 43 Cal. 465; *Marble Co. v. Ripley*, 10 Wall. 339; *Pomeroy Specific Performance*, sections 162-166; *Allen v. Cerro Gordo Co.*, 40 Iowa, 349; *Green v. Richards*, 8 C. E. Green, 32; *Justice v. Lang*, 42 N. Y. 493; *Raymond v. Pritchard*, 24 Ind. 318; *Hixon v. Cuppy*, 33 Ind. 210.

In his valuable work on Specific Performance of Contracts, section 166, Mr. Pomeroy says: "An agreement may be perfect in its obligations upon both the parties, and yet be of such a nature that one of them only could be compelled, by

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a decree of the court, to specifically perform. As the absence of this kind of mutuality does not render the agreement any less obligatory, it would seem, on principle, that if the quality, originally lacking, should be subsequently supplied, in any practical manner, before the commencement of the suit, or even, perhaps, before the hearing, the objection would then be removed, and a specific enforcement would be thus made possible."

It is upon the principle here set forth that the case of *Dellar v. Hile*, 123 Ind. 68, and similar cases rest.

It has long been a familiar rule in this State that a third party, for whose benefit a contract is made, may sue upon such contract in his own right. *Leake v. Ball*, 116 Ind. 214; *Bateman v. Butler*, 124 Ind. 223; *Gwaltney v. Wheeler*, 26 Ind. 415; *Waterman v. Morgan*, 114 Ind. 237.

The contract before us was of no binding force on the holders of the bonds and mortgage executed by Alvord until they had accepted it. After such acceptance, however, we know of no reason why it should not be held to bind them as well as the immediate parties to it.

In this case the property in dispute was conveyed by Alvord and wife to the appellee with an option to become the absolute owner of it at any time prior to the maturity of the bonds secured by the mortgage by paying off such bonds. It is not claimed that the appellee ever availed itself of such option. Having failed to do so within the time fixed by the contract, and the time which it was entitled to occupy the property upon the payment of the stipulated rent having expired, it ceased, in our opinion, to have any interest in such property. It held the legal title as a mere trustee for the benefit of the party to whom it expressly agreed to convey it. Such trusts are always enforced by a court of equity upon proper application.

Perry on Trusts, section 98, says: "But if the trust is perfectly created, so that the donor or settlor has nothing more to do, and the person seeking to enforce it has need of no

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further conveyances from the settlor, and nothing is required of the court but to give effect to the trust as an executed trust, it will be carried into effect, at the suit of the party interested, although it was without consideration, and the possession of the property was not changed. And this will be true although the person who is intended to be benefited has no knowledge of the act at the time it is done, provided he accepts and ratifies it when he is notified."

The trust here, so far as Alvord is concerned, is fully executed. The beneficiary has brought his bonds into court for cancellation, and prays that the title held by appellee for his use be transferred to him, while Alvord, who created such trust, and over whom a large personal liability hangs, joins in the prayer. To deny this relief is to permit the appellee to openly repudiate its obligation and to deny Alvord the only adequate remedy he has for his protection against a heavy personal liability which the appellee agreed to extinguish. Our attention has not been called to any rule which would, in our opinion, require a court of equity to give its sanction to such an injustice. We are of the opinion that the circuit court erred in its conclusions of law upon the facts found in this case. It should have entered a decree, upon these facts, for a specific performance of the contract set out in this opinion.

Judgment reversed, with directions to the circuit court to restate its conclusions of law in accordance with this opinion, and to render the proper decree thereon.

ELLIOTT, J., took no part in the decision of this cause.

Filed June 16, 1892; petition for a rehearing overruled Oct. 5, 1892.

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The Lake Erie and Western Railway Company v. Kennedy.

No. 15,397.

THE LAKE ERIE AND WESTERN RAILWAY COMPANY v.
KENNEDY.

LICENSE.—Power of Revocation.—Estoppel.—A mere permission to occupy land is a license, which may be revoked by the licensor or his grantee, unless some act is done which operates by way of estoppel to make the license irrevocable.

From the Howard Circuit Court.

J. O'Brien and W. E. Hackedorn, for appellant.

ELLIOTT, J.—The parties by agreement made the evidence taken in the case of *Lake Erie, etc., R. W. Co. v. Michener*, 117 Ind. 465, part of the evidence in this case, and, as to other matters, dispensed with evidence by an agreement as to the facts. We are unable to perceive any substantial difference between the case we have referred to and the one now before us, and we think the former rules this case. It is contended by counsel that there is an essential difference between the two cases, inasmuch as in the present case the structures placed on the land were standing when Kennedy purchased the land from Macy, through whom both parties claim, while in the other case they were removed before the purchase by Michener. If it were granted that this difference exists between the two cases, the result would not be affected, for the evidence justified the conclusion that the occupancy of the lands was by virtue of a mere permissive license from Macy, and not by virtue of any right or claim of ownership. Macy never intended to grant an interest or estate in the land, so that the appellant did not acquire the rights of an owner. Nor was there an irrevocable license. There was a permission which gave a right of occupancy and nothing more. There is no element of fraud, and no consideration was paid for the right to use the land. A mere permission to occupy land is a license which

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may be revoked by the licensor or his grantee unless some act is done which operates by way of estoppel to make the license irrevocable. There is here no element of estoppel that transforms the permission to occupy into an irrevocable license.

Judgment affirmed.

Filed October 5, 1892.

No. 15,846.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY v.
CRAUCHER.

RAILROADS.—Complaint Against.—Motion to Make More Specific.—What Facts Sufficient to Constitute a Passenger.—Exonerating Facts Must be Set Up in Defence.—In an action against a railroad company, the complaint alleged that the defendant was a common carrier, etc., and at a certain date the plaintiff took passage and was admitted as a passenger in one of appellant's cars in one of its trains, to be carried from Medora, in Jackson county, to his home in Sparksville, both of said stations being on said defendant's road.

Held, that a motion to make the complaint more specific in alleging how and in what manner he was admitted as a passenger in one of appellant's cars, and whether he purchased a ticket, or was prevented therefrom, and, if so, how, or whether he paid or tendered his fare from the point of entrance to the point of destination, was properly overruled. The facts stated made him a passenger.

Held, also, that if any fact exists which exonerates the company from treating him as a passenger, it must be pleaded in defence.

INSTRUCTIONS TO JURY.—Refusal to Give.—When Reversible Error.—On the trial of a cause the appellant asked the court to give the following instruction, which was refused; "If you find from the evidence that a witness who has testified in the case is a person of bad moral character, you should consider that fact in determining what weight, if any, you will give to his testimony." There being evidence tending to establish the fact covered by the instruction, and no other instruction bearing upon the same fact being given by the court, the refusal to give the instruction was reversible error.

From the Jackson Circuit Court.

The Ohio and Mississippi Railway Company v. Craucher.

W. M. Ramsey, L. Maxwell, R. Ramsey, E. Barton, H. D. McMullen, W. R. Johnson and H. R. McMullen, for appellant.

R. Applewhite and J. F. Applewhite, for appellee.

OLDS, J.—This is an action brought by the appellee against the appellant for damages sustained by reason of being forcibly ejected from appellant's train of cars.

The first error assigned and discussed by appellant's counsel is the overruling of a motion by appellant to require the appellee to make each paragraph of his complaint more specific in alleging how and in what manner he was admitted as a passenger in one of appellant's cars, and whether he purchased a ticket or was prevented therefrom, and if so, how, or whether he paid or tendered his fare from the point at which he entered the car to the point of his destination.

Each paragraph of the complaint alleges that the appellant was a common carrier, etc., and at a certain date the appellee took passage and was admitted as a passenger in one of appellant's cars in one of its trains, to be carried from Medora, in Jackson county, to his home in Sparksville, both of said stations being on said appellant's road.

We regard the allegations as sufficient. The allegation that he took passage to be carried from one station to another is a fact that made him a passenger. It is contended that the allegation that "he was admitted as a passenger" is the allegation of a conclusion, and that it is necessary to allege facts which constituted the appellee a passenger upon the train. Possibly the word "passenger" is a conclusion, but if that be struck out, it leaves the averments in the complaint to the effect that the appellee took passage upon a car in one of the appellee's trains, and was admitted in one of defendant's said cars to be carried from the point of entry to the point of destination. These facts alleged made him a passenger. A common carrier is bound to accept as passengers and carry all persons unless some lawful reason exists for excluding

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them from their trains, and the fact that a person presents himself at a station, and is permitted to enter a car, and does enter for the purpose of being carried from such point to another station upon the line of the road at which the train stops, makes him a passenger, and he is entitled to be treated as such. If any facts exist which exonerate the company from treating such person as a passenger or which forfeits his right to be carried upon such train, it must be pleaded as a defence. We think the facts pleaded in each paragraph of the complaint are sufficiently specific, and the motion was properly overruled.

The next alleged error discussed is the refusal to give instruction numbered three requested by the appellant, which is as follows :

"3. If you find from the evidence that a witness who has testified in the case is a person of bad moral character, you should consider that fact in determining what weight, if any, you will give to his testimony."

This instruction was refused, and no instruction upon the subject was given by the court. There was some evidence at least tending to establish the fact that the general moral character of the appellee, who testified in his own behalf, and who was a material witness in the case, was bad. One witness at least testified to having lived at Sparksville, the home of the appellee, for two years, and only left there some two months before the date of the trial ; that he was acquainted with appellee's general moral character, and that it was bad.

This was competent evidence, and a matter which the jury had the right to consider in weighing his testimony, and there being testimony tending to establish the general bad moral character of the witness, it was for the jury to determine what weight they should give to such testimony, and it was a matter which the appellant had the right to have the jury instructed upon. It is suggested by counsel for the appellee, in relation to the refusal to give this instruction,

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that "In the first place the ruling of the court did the defendant no harm. In the second place there was no evidence against the character of the appellee when measured by the legal test," and that the witness "stated he did not know what the reputation was at the time of the trial." It is true the witness said he had been absent from Sparksville since about two months prior to the trial, but the witness testifies positively that when he was there appellee's reputation was bad. The testimony related to such a recent date prior to the trial that it was competent, and was admitted, and therefore it was for the jury to weigh it and determine whether it affected the credibility of appellee as a witness.

As to why the ruling did the appellant no harm no reason is suggested by appellee's counsel.

In our judgment the ruling of the court in refusing to give the instruction requested was erroneous.

There are a number of other errors assigned and discussed relating to the introduction of evidence and the giving of instructions, but they are questions that may not arise on a retrial of the cause, and the general principles of law governing in the trial of such causes is so well settled that it is unnecessary to pass upon the other questions presented.

Judgment reversed, with instructions to the circuit court to grant a new trial.

Filed Oct. 4, 1892.

No. 14,943.

THE BRITISH-AMERICAN ASSURANCE COMPANY, OF TORONTO,
v. **WILSON ET AL.**

132	278
156	423
132	278
158	684
132	278
158	658

INTERROGATORIES.—*Dividing Interrogatory.*—*Party Complaining Must Affirmatively Show that he is Injured Thereby.*—Where the claim is made that the court erred in dividing an interrogatory asked by a party, and in submitting it to the jury as two interrogatories, it must affirmatively appear from the record that the party complaining of this action of the court was thereby injured.

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SAME.—Antagonism, Degree of, How Must Appear.—The antagonism between the special findings and the general verdict must be apparent on the face of the record beyond the possibility of being removed by any evidence legitimately admissible under the issues.

SAME.—Evidence Can Not be Considered.—In passing upon the antagonism between the general verdict and the interrogatories, the evidence can not be considered.

SAME.—Presumption in Aid of.—No presumption in aid of the answers to interrogatories will be indulged in by the court on a motion for judgment on such interrogatories, all reasonable presumptions and intendments being against them.

MARINE INSURANCE.—General Average, When Allowed.—To constitute a case for general average under a marine insurance policy, it must be shown that the ship and cargo were placed in a common imminent peril, that there was a voluntary sacrifice of property to avert that peril, and that by that sacrifice the safety of the other property was presently and successfully attained.

SAME.—Facts Sufficient to Show case for General Average.—Overturning General Verdict by Interrogatories.—Therefore, an answer of the jury to an interrogatory showing only that there was a sacrifice of property to relieve the property saved from a danger of navigation, and for the best interest of the property at risk, is not sufficient to overturn a general verdict for the insured.

From the LaPorte Circuit Court.

R. Rae, J. A. Thornton and J. H. Orr, for appellant.

M. Nye and J. F. Gallaher, for appellees.

MILLER, J.—This was an action by the appellees against the appellant upon a policy of marine insurance.

The amended complaint is in substance as follows:

That the plaintiffs, Cook and Wilson, complain that on the 22d of June, 1888, the defendants, a corporation doing business under the laws of Indiana, executed to the plaintiffs its policy of insurance, a copy of which is attached to the complaint, and in consideration of the premium paid, and by the contract proposition made on said date, of which a copy is herewith attached, the defendant agreed to insure Cook and Wilson against any and all loss which they might sustain, by means of the perils and misfortunes that might come to the hurt, detri-

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ment or damage of all kinds of lumber and timber, goods, wares and merchandise, by reason of the shipment and during the voyage, to any of the vessels, or on any of the lakes, from the point of shipment to the point of destination from said 22d June, 1888, to the following 30th of November; that on or about the 31st of September, 1888, the plaintiffs loaded on board the barge Rice, at the port of Deer Park, Lake Superior, bound for and consigned to Michigan City, a cargo of lumber, the property of the plaintiffs, consisting of 575,800 feet, of the value of \$6,716.60, which cargo was covered by the policy of insurance of defendant.

On the 22d of September, the barge R. N. Rice, with cargo on board, left port of Deer Park in tow of the propeller Huron City, and bound for Michigan City, and while on said voyage the barge, by reason of the storms, was, by the perils and damages of the lakes and force of the waves, wrecked and lost, together with her cargo, of the value aforesaid; that due notice was forthwith communicated from plaintiffs to defendant, and thereupon the cargo was duly abandoned to the defendant by proper notice, and that the abandonment was accepted by defendant; that afterwards protest and proofs of loss according to terms of policy were made and forwarded to defendant, together with a copy of the invoice and tally-sheet of lumber, and made part of the proofs of loss. Plaintiffs aver that they performed all the provisions of the policy required by them to be performed, and the defendant became liable to them for the value of said cargo, to wit: \$6,717.60, but that the defendant wrongfully refuses to pay, and demands judgment for \$7,500.

A demurrer to the complaint was filed and overruled, and this ruling is assigned as error, but no argument being made in support of this assignment, it is to be taken as having been waived. Elliott's App. Procedure, section 444.

The defendant answered, in substance, as follows:

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First. Denies each and every allegation of the complaint.

Second. The defendant further answering says that when the cargo was taken on board on September 22, 1888, the Rice was not tight, staunch and strong enough to resist the ordinary perils of the lakes, and other perils covered by the policy of insurance in this case, and that the vessel was not at the time of shipment, nor at the time of loss of cargo, seaworthy, or lakeworthy, or fit to undertake and perform her intended voyage, and that she continued unseaworthy before, from and at said shipment of said cargo on board of her until the cargo was lost. The cargo was lost by reason of unseaworthiness, and not otherwise.

Third. That after the Rice had taken in and aboard said cargo mentioned in said complaint, she started on her intended voyage, etc., and was on the 26th day of September, 1888, at the port of Manistee, a place of safety, the master well knew that the said vessel was unseaworthy, and not fit to stand the ordinary perils of the lakes.

The port of Manistee was a port of repair, and it there became and was the duty of the master and others, or either of them, to repair said vessel and put her in a seaworthy condition, and that he neglected said duty, and on the morning of September 29, 1888, resumed the voyage in an unseaworthy and unsafe condition, and that the vessel and her cargo was thereby lost, and not otherwise.

Fourth. That the Rice, with said cargo on board on said voyage, in tow of the Huron City, a water craft owned by plaintiffs at the time said cargo was lost on Lake Michigan, September 30, 1888, under contract of towage to tow the Rice with cargo on board, whereof the plaintiffs were owners, and defendant underwriter; and that by terms of the contract of towage, it is provided that the officer of the Huron City should skilfully and carefully

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tow the Rice with cargo on board from Deer Park to Michigan City, the dangers of navigation alone excepted.

By the terms of the contract it became the duty of the master of the Huron City to carefully and skilfully tow the Rice and so manage the tow that the cargo might not be cast adrift or in any manner unnecessarily exposed to any peril which the master of the Huron City, in the conduct and management of his tow by due care and skill could prevent. But nevertheless the master was regardless of his duty in this respect, and did in violation of his duty cast adrift the Rice, and caused his vessel to abandon her, etc., and said cargo was by reason of said want of skill and care on the part of the officers lost, and not otherwise.

A reply of general denial put the case at issue.

The cause was tried by jury and a general verdict for the plaintiff for the full amount of the loss was returned, together with answers to the following special interrogatories submitted by the court:

"1. Was the barge R. N. Rice seaworthy when she commenced her voyage from Deer Park on the 22d of September, 1888, with plaintiff's cargo on board? A. Yes.

"2. Was the barge R. N. Rice unseaworthy when she put into Manistee on the 26th of September, 1888, and if so, could she have been made seaworthy at Manistee? A. No.

"3. Did the Rice leave the port of Manistee in an unseaworthy condition? A. No.

"4. Did the officer of the steamer Huron City act negligently in cutting the barge Rice adrift in Lake Michigan? A. No.

"And if not, did they cut her adrift to relieve the Huron City and the tow from a danger of navigation, and for the best interest of the property at risk? A. Yes."

The record, both in the journal entries and bill of ex-

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ceptions, informs us that after the jury returned their verdict and answer to interrogatories the defendant moved the court for a judgment, notwithstanding the verdict, which motion was overruled and excepted to, and, thereupon, the jury was required to retire to their room and again answer interrogatory four, to which the appellants excepted, and the jury again returned into court with the answer revised.

The action of the court in directing the jury to retire to their room and revise their answer to this interrogatory is complained of. We could only interfere with the discretion necessarily lodged in the trial court where it appears from the record that the complaining party has been injured by the action of the court. We are nowhere informed what changes were made by the jury in their answer to the interrogatory, and can not, therefore, ascertain whether the court abused its discretion or the appellant was injured by the action of the court. Assuming that the change consisted in dividing the fourth interrogatory into two parts and answering each separately, we can not say that the action of the court was not in furtherance of justice.

It is earnestly contended by appellant's counsel that the court erred in overruling their motion for judgment in favor of the defendant, notwithstanding the general verdict.

The special findings of the jury override the general verdict only when both can not stand; and this antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues. *Lockwood v. Rose*, 125 Ind. 588; *Matchett v. Cincinnati, etc., R. W. Co.*, *post*, p. 334. In reviewing the ruling upon the motion for judgment on the measure to interrogatories, we can not look to the evidence.

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Pennsylvania Co. v. Smith, 98 Ind. 42; *Cox v. Ratcliffe*, 105 Ind. 374.

We are, therefore, to determine whether there is such repugnancy between the general and special verdicts that it could not have been removed by evidence, admissible under the issues.

The contention of the appellant is, that the answer to the latter part of the fourth interrogatory, to the effect that the R. N. Rice was cut adrift "to relieve the Huron City and the tow from a danger of navigation and for the best interest of the property at risk," shows that the insurer, if liable at all, is only liable for a general average loss, and there having been no adjustment as provided in the policy, the action was prematurely brought.

We are of the opinion that the facts stated in the answer to the interrogatory are not sufficient to bring the case within the rule contended for by appellant's counsel.

In *Barnard v. Adams*, 51 U. S. 270, 302, the court says that:

"In order to constitute a case for general average, three things must concur:

"*First.* A common danger; a danger in which ship, cargo, and crew all participate; a danger imminent and apparently 'inevitable,' except by voluntarily incurring a loss of a portion of the whole to save the remainder.

"*Second.* There must be a voluntary jettison, *jactus*, or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril, *pericula imminientis evitandi causa*, or, in other words, a transfer of the peril from the whole to a particular portion of the whole.

"*Third.* This attempt to avoid the imminent common peril must be successful."

In *Sonsmith v. Donaldson*, 21 Fed. Rep. 671, the court cites from the opinion of Mr. Justice Story in *Columbian Ins. Co. v. Ashby*, 13 Pet. 331, the following:

"*First.* That the ship and cargo should be placed in a

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common imminent peril; *secondly*, that there should be a voluntary sacrifice of property to avert that peril; and, *thirdly*, that by that sacrifice the safety of the other property should be presently and successfully attained."

In 2 Arnould Ins. 885, the law is thus stated :

"It is an undoubted requisite of a general average loss that it should have been incurred under the pressure of a real and imminent danger. The sacrifice may have been *bona fide* made with a view to the general safety; but it can give no claim to contribution unless that safety shall appear to have been really endangered. I am not bound to make good to another a loss he has intentionally incurred, with a view to my benefit, if such loss was one which a man of ordinary firmness and sound judgment would not, under the circumstances, have submitted to. *The sacrifice must have been made under the urgent pressure of some real and immediately impending danger, and must have been resorted to as the sole means of escaping destruction.*"

The answer to the interrogatory, especially when taken against the general verdict, that the Rice was cut adrift "to relieve the Huron City and the tow from a danger of navigation and for the best interest of the property at risk," comes short of showing that the sacrifice was made to avert a common danger, immediately impending, and as the sole means of averting the destruction of ship, tow, cargo and crew.

We can indulge in no presumption in aid of the answers to interrogatories, all reasonable presumptions and intendments being against them. *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88; *Redelsheimer v. Miller*, 107 Ind. 485; *Rice v. City of Evansville*, 108 Ind. 7; *Ft. Wayne, etc., R. W. Co. v. Beyerle*, 110 Ind. 100; *Cincinnati, etc., R. R. Co. v. Clifford*, 118 Ind. 460.

The answer in the preceding portion of the interrogatory, that the officer of the Huron City did not "act neg-

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ligently, in cutting the Rice adrift, does not aid the position of the appellant, the allegation that the act was not negligent being a mere conclusion of the jury which they were not authorized to find by special verdict. *Conner v. Citizens', etc., R. W. Co.*, 105 Ind. 62; *Louisville, etc., R. W. Co. v. Balch*, 105 Ind. 98; *Chicago, etc., R. W. Co. v. Burger*, 124 Ind. 275.

If the answer to the interrogatory was not defective as indicated, it would not control the general verdict returned for the plaintiff, for an additional reason. The complaint charges that the cargo insured was abandoned by the insured to the underwriter, and that the abandonment was accepted. The ownership of the Huron City is not found in any of the special findings. We are therefore authorized, in aid of the general verdict, to presume that there was evidence sufficient to justify the jury in finding that the cargo was abandoned to the underwriter and the abandonment duly accepted, and, if that be important, that the Huron City was not the property of the insured. If such were the facts in the case, it was the duty of the underwriter to pay, as upon a total loss, and sue the owner Huron City for contribution. 2 Pars. Marine Ins. 289, and cases cited.

The answers to the other interrogatories are not claimed to be, in any manner, inconsistent with the general verdict.

In our opinion the court did not err in overruling the motion of the defendant for a judgment on the answers to interrogatories, notwithstanding the general verdict.

The action of the court in overruling the defendant's motion for a new trial is also assigned as error.

The only cause for a new trial, not embraced within the discussion in the foregoing opinion, is that the verdict of the jury is not sustained by sufficient evidence.

In support of this assignment counsel have submitted elaborate briefs devoted to a discussion of the evidence,

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and questions of navigation and marine insurance. The view that we take of the effect of the verdict of the jury renders it unnecessary for us to enter into an examination of the question of law embraced in the arguments of counsel. As we have said, the answers to interrogatories, other than a portion of the fourth, are in complete harmony with, and in aid of, the general verdict. We may, therefore, in the consideration of the remaining questions involved, look to the general verdict alone, disregarding entirely the interrogatories and their answers.

By their general verdict the jury determined all the issues joined between the parties litigant in favor of the plaintiffs. Having been advised by the evidence as to the facts, and the instructions of the court as to the law, their verdict is to be deemed a determination of the facts, according to the rules of law embraced within the instructions; as well as all mixed questions of law and fact.

The instructions of the court were unusually full and accurate and quite favorable to the views of the law as set forth and the briefs of appellant's counsel. We have studied the evidence with care and are of the opinion that there is evidence, in support of the verdict, upon every material issue involved. We express no opinion as to its weight, that is not within our province. When we have determined that there is some evidence in support of the verdict our duty is at an end.

We deem it not improper to say, in view of the discussion relative to casting the Rice adrift, that the evidence does not show that the Rice was cast away to relieve the Huron City, or its cargo, or crew, from an impending danger, but in order to enable it, with safety, to take off the crew of the Rice, who were in deadly peril.

In our opinion the court did not err in overruling the motion for a new trial.

Judgment affirmed.

Filed Oct. 4. 1892.

 Thompson v. Thompson.

No. 15,822.

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DIVORCE.—*Effect of Decree on Wife's Right to Husband's Real Estate.*—*Third Parties.*—A decree in divorce settles all property rights between husband and wife, but not between her and third parties.

SAME.—*Conveyance by Wife under Coercion or Ignorance.*—*Suit after Divorce to Set Aside.*—In 1883 a wife through coercion and under mistake joined in the execution of a deed conveying certain real estate of her own, and thereafter continued to live with him without fear or constraint, until 1887, when she obtained a divorce from him for cruelty. During the period between the date of the conveyance and date of the divorce, she lived and cohabited with her husband without fear or constraint, and had by him two children, but never made any complaint or inquiry concerning the deed until after the trial of the divorce case. In the divorce case the husband filed an answer alleging that she had received from him certain real estate and personal property which was to be in full of all interest and claim she had in all property then or thereafter owned by both of them, and in full of alimony. After the divorce the grantee of the lands conveyed them to the husband, and she then brought suit to quiet title thereto and to cancel the deed.

Held, that she could maintain the action.

Held, that the facts stated did not show a ratification.

Held, that she was not bound to bring an action to quiet title and to cancel the deed while she was cohabiting with her husband.

Held, also, that the answer in the divorce case did not raise an issue; that the parties had no power to make a valid contract concerning alimony, and that she was not bound by the decree so far as the land in controversy was concerned.

SAME.—*Contract Concerning Alimony.*—Husband and wife have no power to enter into a contract concerning alimony in a prospective divorce proceeding.

From the Porter Circuit Court.

A. J. Gould and A. L. Jones, for appellant.

G. W. Beeman, T. J. Thompson and H. R. Robbins, for appellee.

OLDS, J.—This is an action by the appellant originally commenced in the Starke Circuit Court against the appellee, Thomas J. Thompson, and one Charles J. Thompson. The complaint is in two paragraphs. The first is to quiet

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title, and the second is to set aside a deed to said Charles J. Thompson for said real estate, executed by the appellant under duress and coercion of her husband. The real estate is situate in Starke county. The said Charles J. Thompson, after the conveyance to him, conveyed the real estate to the appellee. The title to some of the real estate was held by the appellant in her own right and some of it held by her as a tenant in common with her husband.

Issues were joined, and there was a trial had. On proper request the court found the facts and stated its conclusions of law.

The appellant excepted to the conclusions of law, and the error assigned is that the court erred in its conclusions of law.

The facts found by the court are substantially as follows:

That on the 3d day of October, 1883, and for ten years prior thereto, the appellant and appellee were husband and wife; that on said day appellant owned the real estate as heretofore stated, part in her own right and part as a tenant in common with her husband.

That on said 3d day of October, 1883, the plaintiff and defendant executed a quitclaim deed conveying all of said lands to one Charles J. Thompson, a son of appellee, by a former marriage; which deed was recorded in the office of the recorder of Starke county, on the 19th day of July, 1886. That said deed was so executed by appellant under coercion and duress of her husband, the appellee, and without any consideration whatever, and was intended by the appellee to raise a trust in favor of himself. That on the 19th day of November, 1886, the said Charles J. Thompson conveyed all of said lands to the appellee, Thomas J. Thompson, by a deed which was recorded in the office of the recorder of said Starke county

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since the last term of the Porter Circuit Court, except the piece in section 28, which was on said 19th day of November, 1886, conveyed by said Charles J. Thompson, at the request of appellee, to one J. R. Thompson, by deed dated on that day.

That at the time of the execution of said deed by appellant and appellee to the said Charles J. Thompson, the appellant knew it was a deed and acknowledged it as such, but was ignorant of the contents thereof, and was unable to read the same; that appellee at the time told appellant that the grantee named in said deed was a person residing in Fort Wayne, Indiana, with whom appellee was trading for property at Fort Wayne, and that appellant did not know that the said Charles J. Thompson was the grantee therein, nor the contents of said deed, until the afternoon of the day on which the action for divorce, hereinafter mentioned, was tried, and after the trial thereof.

That at the date of the marriage of appellant and appellee, the appellant was the owner of a farm and other real estate in Starke county, the management and control of which the appellee at once assumed, and appellee continued to control and manage the lands of the appellant as well as that owned by her at the time of their marriage, as that subsequently acquired by her up to the time of the commencement of the divorce suit hereinafter mentioned. That after the execution of said deed to the said Charles J. Thompson the appellant continued to live and cohabit with the appellee without fear or constraint until about the time of the commencement of her divorce suit, and during said time had by him two children, but never made any complaint or inquiry as to the said deed until after the trial of the divorce case, and did not commence any suit in that behalf until the commencement of this suit on the 8th day of August, 1887.

That at the time of such divorce the appellant was the owner of divers other pieces of real estate in said Starke

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county, and since such divorce has sold and conveyed several pieces thereof, of the value of several hundred dollars.

That on the 12th day of October, 1886, the appellant commenced an action against the appellee in the Starke Circuit Court for divorce. That on the 13th day of October, 1886, the appellee appeared to said action.

The complaint charged cruel treatment, and asked the custody of their seven children born to them during their marriage. The appellee answered by denial and further answering alleged that he had given to the appellant certain real estate and personal property which was to be in full of all interest and claim she has in all property then or thereafter owned by each, either or both, and in full of alimony.

The cause was submitted to the court for trial on said 13th day of October, 1886, resulting in a decree of divorce in favor of the appellant and a judgment in her favor for \$200 alimony.

The court stated as conclusions of law :

First. That appellant ratified said deed to Charles J. Thompson by her after conduct.

Second. That said suit and judgment for divorce and alimony was and operates as an adjudication of all the matters complained of in this suit and herein found, and by reason thereof the appellant is estopped to deny said deed and has no right or title in or to any of said land, and rendered judgment for the appellee.

It is insisted by counsel for the appellee that the questions in this case were involved in the suit for divorce, and that all the property rights between the husband and wife were settled by the decree in that case, and that not only what was in fact litigated, but what might have been litigated, is settled by that adjudication. We are fully aware of the rule stated by counsel, but we do not think this case comes within the broadest doctrine of the rule.

The facts found show that the appellant was by coercion

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and duress compelled by her husband to execute a deed for her individual real estate conveying the same to a son of the husband by a former marriage; that the conveyance was without any consideration whatever; that the appellant did not know the contents of the deed or who was named as grantee until after the disposition of the divorce case. The title to the land conveyed remained in the grantee, Charles J. Thompson, until some time after the divorce was granted.

From the time of the making of the deed to the time the land was reconveyed the wife might, at any time, have brought an action against Charles J. Thompson, the grantee, to have the deed cancelled and to quiet her title. This right of action existed in the wife against the grantee at the time of the divorce proceedings. The divorce proceedings settled all property rights between her and her husband, but not between her and third parties. The husband did not, at the time of the divorce nor at any other time prior thereto, own the land. The wife, by coercion, had been compelled to part with the legal title, but she still owned the equitable title to the land.

It is found as a fact that it was intended by the appellee to create a trust in his favor, but such conveyance did not create any trust, and the wife's rights could not be affected by such secret intention on the part of the husband, who compelled her to sign the deed against her will. Nor was there any ratification of the deed. The husband compelled the wife to make the deed. All she did afterwards was to live with him as a dutiful wife for some three years. The fact that she said or did nothing about the matter for that length of time can not be said to be a ratification. It is quite probable that the very reason she kept quiet was to have peace in the household, for the comfort and benefit of herself and family. All that it appears she did was to keep silent about a wrong and an injury done to her by her husband

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in compelling her to part with her property. Certainly the husband ought not to profit by such kindness on the part of the wife. *Koons v. Blanton*, 129 Ind. 383. The action is not barred by limitation, and no rights of innocent parties have intervened.

The right of action existed against Charles J. Thompson at the time of the divorce proceedings, and since that time he has conveyed the land to his father, the appellee. When the appellee received title to the land, he having full knowledge of the facts and himself being the person compelling the conveyance, the appellant then had a right of action against him.

It is suggested that the second paragraph of the answer in the divorce case put the questions here involved in issue. The answer in the divorce suit amounted to nothing. The parties had no power to make any valid contract relating to alimony. It answered no allegations of the complaint. The things therein stated may have been proper for the court to consider in fixing the amount of alimony, but this the court could do as well without such an answer as with it. As we have said, the decree settled the property rights of the parties to the suit existing at the time, but it did not cancel any right of action existing in favor of the wife against third parties. Suppose Charles J. Thompson had not reconveyed the land to his father after the granting of the divorce, under such a state of facts there can be no doubt that the appellant could have maintained an action against him to set aside the deed, and quiet her title to the land. This right could not be taken from her by a conveyance of the land to her divorced husband.

The court erred in its conclusions of law.

On the facts found the appellant was entitled to have the deeds set aside and to a decree granting her title to the land.

Judgment reversed, with instructions to the court be-

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low to restate its conclusions of law in accordance with this opinion, and to render the proper judgment in favor of the appellant.

Filed June 11, 1892; petition for a rehearing overruled Oct. 5, 1892.

 No. 15,685.

MARKOVER v. KRAUSS.

ADOPTION.—Husband and Wife Jointly Adopting.—Husband and wife may jointly adopt a child.

SAME.—Foreign Adoption.—Filing Record in this State.—By filing in the courts of this State a certified copy of the adoption of a child in another State, the child is not thereby re-adopted; and the child, without the presence or consent of the adopting husband and wife, may cause a record thereof to be made in any court of this State.

SAME.—Effect of Filing Record.—The effect of filing a certified copy of the record of the adoption of a child in another State simply enables the adopted child to enforce such rights as arise out of the original adoption; and until there has been such a compliance with the statute the courts of this State will not recognize or enforce those rights.

SAME.—Adult.—Adoption of.—There is nothing to prevent the adoption of an adult.

SAME.—Child Adopted by Husband and Former Wife.—Right of Childless Widow of Second Marriage as Against Such Child.—A child jointly adopted during a former marriage by husband and wife, takes a fee simple in the real estate of the husband, subject to the life-estate of the childless widow by a second or other marriage, owned by the adopting father at any time during such subsequent marriage in the conveyance of which she has not joined with him. **OLDS, J., and COFFEY, J., dissent.**

DESCENT.—Rights of Childless Widow by Second Marriage.—Life Estate.—A childless widow by a second marriage, when children by a former marriage survive her, takes only a life-estate from her husband, and not a fee simple.

From the Washington Circuit Court.

S. B. Voyles and *J. H. Masterson*, for appellant.

H. Morris, for appellee.

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MCBRIDE, C. J.—From the complaint in this case we gather the following facts: One John G. M. Krauss, a resident of Washington county, died intestate, in the year 1889. At the time of his death he owned in fee simple certain land in that county, described in the complaint. He left surviving him a widow, Hannah Krauss, who had borne him no children. She, assuming to be the owner of the land in question, sold and conveyed it to the appellant, who is her son, and who, it is alleged, paid full value for it. The appellant entered into possession of the land, and is now, and has ever since been, in possession of it, claiming to be its owner by virtue of such purchase and conveyance. The decedent had been twice married before he intermarried with said Hannah, both of his other wives having died prior to his marriage to her. No child was ever born to him by any of his wives. In the year 1862, he resided in Huron county, Ohio, and was married. In October of that year, he, with his then wife, jointly applied to the probate court of that county to be permitted to adopt, as their joint heir, one Isaac Kuhn, and such steps were taken as resulted in his formal adoption as such heir by the name of Isaac Krauss. The heir thus adopted is the appellee herein. The wife, who joined in such adoption, died in 1863. She never had any interest whatever in the land in controversy, which was acquired after her death.

The appellant was the plaintiff below. His complaint is in two paragraphs. The first seeks to quiet his title to the land in controversy, and the second asks for the quieting of his title to the land, for the declaration and enforcement of a lien upon it, and for an accounting, with a general prayer for relief.

In the first paragraph the foregoing facts are all set out, and it is averred in addition that no transcript of the proceedings in the probate court of Huron county for the adoption of the appellee was ever brought into this State until after said John G. M. Krauss and his widow were both dead,

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and the appellant was in possession and claiming ownership of the land, but that the appellee has recently filed such transcript in the clerk's office of Washington county, and has thereby created a cloud upon the appellant's title, and is himself asserting title to the land. Whether the transcript of the record of the adoption proceedings has, or has not, been entered upon the order-book of the Washington Circuit Court in open session, as required by section 829, R. S. 1881, is not shown by the complaint.

The appellant's counsel, in argument, contend that, under section 829, above cited, a child adopted in another State acquires no rights enforceable in this State, unless all the parties to the adoption appear in the circuit court of some county in this State, during the minority of the child, file the record of the adoption and cause its entry upon the order-book in open session of such court, and that after the death of either the adoptive father or mother, or the majority of the adopted child, it was too late, and the adopted child could not thereafter acquire nor enforce any rights by virtue of such adoption; that if this is not true, the adopted child does not stand upon the same footing as a natural child, or a child born to the adoptive father, and that, as against such adopted child the widow, even if a second wife and childless, will take absolutely all of her deceased husband's property.

Section 829, R. S. 1881, provides that, when a child is legally adopted in any State of the United States other than this State, in accordance with the laws of that State, and a transcript of the record of such adoption is filed and entered upon the order book of any circuit court in this State, such adoption shall thereafter have the same force and effect, and such adopted child shall have the same rights as if the original adoption had occurred in this State and pursuant to its laws. Compliance with section 829 simply enables the adopted child to enforce such rights as arise out of the original adoption, and, until there has been such compliance, the

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courts of this State will not recognize or enforce those rights. The act of compliance with the requirements of that section is in no sense a re-adoption of the child, as argued by counsel, and there is no reason why either the adoptive parents or the adopted child should at the same time appear in person in the court where such record is filed, or is ordered spread upon the order book. Such appearance is, in our opinion, not necessary. Nor is it necessary that such record be filed during the lifetime of the adoptive parents or during the minority of the adopted child. Counsel argue that because in the statute providing for the adoption of heirs the word "child" is used, the proceeding can only apply to infants; that an adult is no longer a child, and hence cannot be adopted, and, the same word being used in providing for the filing in the courts of this State of the evidence of a foreign adoption, such evidence must of necessity be filed while the adopted heir is still a "child," i. e., still an infant. It is true that the word "child" is used throughout the entire statute, including section 829. It is also true that the word child, as commonly used, carries with it the idea of tender years and of minority. It is, however, also true that one's child does not cease to be his child when it attains its majority. The statute, unlike the statutes of many of the States, contains no provision fixing or limiting the age at which heirs may be adopted. We can see no reason why its provisions may not apply to adults equally with infants. We think they may, and do, and that the record of the foreign adoption filed after the adopted child has attained his majority is equally effective as if filed before that time.

The complaint showing, as it does, the actual adoption of the appellee, and his rights as such adopted child arising, as we have said, out of the act of adoption, and not out of the filing and entry of the record of adoption on the order book of the Washington Circuit Court, it is not material that it does not appear from the averments of the complaint whether the record has been heretofore entered upon the order book

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in open session or not. If not yet made, it is his right, under the statute, to have it made at any time. If, as such adopted child, he has any interest in the land which might be enforced after the filing of such record and its entry upon the order book, the appellant can not quiet his title as against such interest.

If the appellee, instead of being the adopted child of John G. M. and Barbara Krauss, the first wife, had been their natural child, born to said John G. M. by said Barbara, it is conceded that neither the widow Hannah nor her grantee could hold the land as against him. As a childless second wife she would, under the proviso to section 1 of the act of March 11th, 1889, section 423, Elliott's Supplement, have taken in the land only a life-estate, and the fee would, at the death of the husband, have vested in the appellee. That proviso reads as follows:

"Provided, That if a man marry a second or subsequent wife and has by her no children, but has children alive by a former wife, the interest of such second or subsequent childless wife in the lands of the decedent shall only be a life-estate, and the fee of the same shall, at the death of such husband vest in such children, subject only to the life-estate of such widow." The appellant insists that this proviso has no application whatever to an adopted child, but applies only to such children as have been *born* to the party by a former wife. This they insist is the only reasonable interpretation that can be given to the expression, "children by a former wife."

The question thus presented is an interesting one, and not free from difficulty. Its solution requires an inquiry into the status of adopted children, and the relative rights of such children and of natural children. In such an inquiry we can get no light from the common law, as that law made no provision for the adoption of heirs.

The law of adoption comes to us from the Roman law, and its appearance in our system of jurisprudence is in the

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nature of an engrafting of certain principles of that law rather than a statutory creation.

Our statute for the adoption of heirs provides that, "From and after the adoption of such child it shall take the name in which it is adopted and be entitled to and receive all the rights and interests in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother." Section 29, Elliott's Supp., Acts 1883, p. 61.

It further provides that, "After the adoption of such child, such adoptive father or mother shall occupy the same position toward such child that he or she would if the natural father or mother, and be liable for the maintenance, education, and every other way responsible as a natural father or mother." Section 826, R. S. 1881.

Our task requires us to construe the foregoing statutory provisions relating to the adoption of heirs, and the rights thereby secured to the adopted child in connection with the statute fixing the rights of a second or subsequent childless wife in her husband's property. We approach this task in the light of the rule of construction, which requires us to view the whole body of our laws, statutory and otherwise, as together constituting a harmonious whole, each part and provision consistent with every other part. And that it is our duty to reconcile and harmonize, rather than to discover and emphasize apparent inconsistencies. Sutherland Statutory Construction, sections 287-289; *Merritt v. Gibson*, 129 Ind. 155 (173).

Many of the States have engrafted into their system of laws provisions for the adoption of heirs. There is, however, but little, if any, uniformity in the various statutory provisions, and a study of the several statutes, with the constructions given them by the courts, gives us but little light on the point of difficulty.

While the precise question involved has never heretofore been before this court, the general subject of the relations

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existing between natural and adopted children, with the nature and extent of the estate which they inherit from their adoptive parents, has several times been fully considered. See *Humphries v. Davis*, 100 Ind. 274; *Krug v. Davis*, 87 Ind. 590; *Davis v. Krug*, 95 Ind. 1; *Humphries v. Davis*, 100 Ind. 369; *Paul v. Davis*, 100 Ind. 422; *Isenhour v. Isenhour*, 52 Ind. 328, and many other cases.

A discussion of the question that is especially full, interesting and instructive will be found in the case first above cited. In that case the court fully recognizes the civil law as the source to which we must look for authority, upon the ground that the power thus given one to name a person not of his blood to be the lawful inheritor of his property if he dies intestate, is in the nature of a legislative enactment of certain provisions of the Roman law. As is there said: "It is established law that where a rule is borrowed from another body of laws, courts will look to the source from which it emanated to ascertain its effect and force."

Turning then to the Roman law we read: "He who is either adopted or arrogated is assimilated in many points to a son born in lawful matrimony." Institutes of Gaius, book 1, section 105, Sandars' Justinian, 45.

"Adoptive children, so long as they are held in adoption, are in the position of children born to us." Institutes of Gaius, book 2, section 136, Hunter's Roman Law, p. 58.

While Justinian revised, and in many respects changed the law relating to the adoption of heirs, it will be found that the changes made by him were in the nature of an enlargement instead of a diminution of the rights of the adopted child. For instance, originally, the adopted child, on adoption, lost all rights in the family of his natural parents. He was no longer in any legal sense related to them, and had no interest whatever in their estate. If thereafter his adoptive father emancipated him, he was without a family, having no legal right in either the family of his natural or his adoptive father. One of the changes made by Justinian was

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to remedy this injustice. Hunter's Roman Law, 63. After his revision, as before, the adopted child, while held in the bonds of adoption, was still in the position of a natural child, or a child born to the adopting father. Not, as is said in *Humphries v. Davis*, *supra*, that the law contemplated to do the work of nature and create a child of one's blood out of a stranger, but, that the law could, and did make the legal status of the one in every respect that of the other. Thus, the son of the adopted son was by the law made the grandson of the adopting father, with all the legal rights incident to that relation.

Louisiana is the only one of the United States in which the civil law ever prevailed, it having been in force there until 1808. In the case of *Vidal v. Commagere*, 13 La. Ann. 516, the Supreme Court of that State was required to construe a special act of the Legislature authorizing certain persons to "adopt" a young orphan child. The act in no manner defined the nature or extent of the rights thus intended to be conferred upon the adopted child.

The court first traces the origin of adoption and its nature and effects as known to the civil law, and then says: "Words having a well known signification in the sources of our jurisprudence ought to be considered as used in that sense when embodied in a statute. As has already been remarked, the former laws of Louisiana authorized adoption, and the rights conferred by those laws are known to our courts. * * * The lawgiver ought not to be supposed ignorant of this state of things, or to use a term in a more restricted sense than it was formerly known to our laws. * * * We conclude, therefore, that, as by the common acceptance of the word 'adoption,' the relationship of parent and child, with all the consequences of that relationship, is understood, as such was the legal meaning of the word under the former laws of Louisiana, and as such is its acceptance among civilians and those conversant with the sources of our laws, we can not say that the Legislature used the word in a more restrained sense; in a

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sense not understood in common parlance, not given in any dictionary, and not known in any system of laws. As by the former laws of Louisiana, the person adopted bore the relation of child to the person adopting, and inherited his estate, so we think the Legislature, by the solemn expression of its will, intended to confer the same right upon the plaintiff to the estate of those who were authorized to adopt her."

The language of our statute is plain and emphatic, declaring that after adoption the adopted child "*shall be entitled to and receive all the rights and interests in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother.*"

It authorizes a joint adoption by both husband and wife.

Viewing this statute in the light of the civil law, it seems clear to us that the legislative intention was to give to adopted children the same relation to adopted parents that was given them by the civil law; that, in so far as property rights are concerned, it was the intention to give to them the same rights as if they were their natural children, or children of their blood; and, when the adoption is joint, that they should, as to all property rights, be, in the eyes of the law, *children of the adoptive father by the adoptive mother.*

As before suggested, we do not mean by this that the Legislature has attempted to perform the impossible feat of doing the work of nature, and of creating a child of one's blood out of a stranger. We simply recognize and acknowledge the untrammelled power of the Legislature to fix the legal status of the respective parties, and to control absolutely the manner in which property shall descend and be distributed.

True there seems at first blush to be force in the suggestion that the statute which gives to the childless second wife only a life-estate in the lands of her deceased husband as against children living by a former wife, being an exclusion of such childless second wife from the full estate of a first

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wife, or of a wife with living children, should receive a construction most favorable to the widow, and that the legislative purpose was simply to discriminate between those of the blood of the intestate and strangers to that blood; that to permit the exclusion in favor of adopted children, while it would prevent the alien heirs of the childless wife from taking, would, in giving it to the adopted children, give it to those of equally alien blood. If the question could be viewed simply as affecting the relative rights of the childless wife and the adopted children, there would be great force in this suggestion, although not as great now as prior to the enactment of section 423, *supra*.

Prior to that time the childless second, or subsequent wife, took a limited fee, and the children living took from her, at her death, as her forced heirs.

Now, on the death of the husband, by the provisions of that statute, the fee at once vests in the living children by the former marriage, and the childless second wife takes a mere life-estate. A little thought will show that it is not so much a question between the childless second wife and the adopted child as it is a question between the natural and adopted children. If the children living are all natural children, it will be conceded that they take the entire fee, subject to a life-estate in one-third, which goes to the widow.

If, however, they are all adopted children, under the construction contended for by the appellant, the widow will take one-third in fee, thus excluding them from all participation in that portion of the estate. The effect of such a construction would be to discriminate in favor of natural and against adopted children, and, in the face of the plain, unequivocal language of the statute, and of the established rules of the civil law, to deny to adopted children the equal rights said to be theirs by virtue of their adoption.

The discrimination and inequality which would result from such a construction of the statute would be still more marked if the party left surviving him both natural and

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adopted children. In such a case the widow would, of course, because of the natural children, take only a life-estate in one-third of the land, the remainder in which would vest in the natural, to the entire exclusion of the adopted children. The effect of such a construction would be to nullify the provisions of section 29, Elliott's Supplement, *supra*, in so far as relates to all cases of this character. It is not possible, by any construction other than that herein adopted, to give full effect to all of the provisions of the statute. The construction we have adopted does this, and not only harmonizes all of the various statutory provisions but is also in harmony with the rules laid down by the civilians concerning the effect of adoption.

The case of *Davis v. Fogle*, 124 Ind. 41, is cited as in conflict with the view adopted by us in this case. An examination of that opinion will show that no question involved in this case was then before the court. That case required the construction of section 2560, R. S. 1881, which provides that, "If, after the making of a will, the testator shall have born to him legitimate issue, who shall survive him, or shall have posthumous issue, then such will shall be deemed revoked, unless provision shall have been made in such will for such issue."

The court correctly decided that the adoption of a child was not having a child "*born to*" the maker of the will. Only the *birth* of a child can have the effect of revoking a will.

Any language used in the opinion seeming to decide the question now presented is outside of the issue then before the court, and can not be regarded as authoritative.

It is impossible to determine from the averments of the second paragraph of the complaint upon what theory it was constructed, while the relief asked is inconsistent and contradictory. In addition to a general prayer for relief, there is, as we have said, a prayer that the appellant's title be quieted, a prayer for the declaration and enforcement of a

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lien, and a prayer for an accounting. Counsel for the appellant, in their brief, also inform us that it is "in the nature of a partition." This is possible. If, however, they mean by this that it is in the nature of a suit for partition, we are unable to discover in its averments anything giving to it that character.

It is a settled rule of pleading and practice in this State that a complaint must proceed upon some definite theory, and that it must be good on the theory adopted. *Moorman v. Wood*, 117 Ind. 144 (147); *Manifold v. Jones*, 117 Ind. 212 (217); *Feder v. Field*, 117 Ind. 386 (391); *Mescall v. Tully*, 91 Ind. 96 (99), and many other cases. Unless it is good upon such definite theory it is not good at all.

It is unnecessary to quote the pleading. It is sufficient to say that the only thing that seems to be clear about it is that the pleader was unwilling in drawing it to commit himself to any definite theory. This court can not construct a theory for him. If it could, we can conceive of no theory upon which its averments are sufficient to constitute a good cause of action.

The court did not err in sustaining the demurrer to it. We find no error in the record.

Judgment affirmed, with costs.

Filed October 5, 1892.

DISSENTING OPINION.

OLDS, J.—I am unable to concur in the opinion of the majority of the judges in this case. As appears from the facts John Krauss, the owner of the land, died intestate in 1889; that at the time of his death he was, and for fifteen years next prior thereto he had been, an inhabitant and resident of Indiana; that he left surviving him Hannah Krauss, his widow; that he had by her no children, and he had born to him no children by any former wife; that during the lifetime of a former wife, and while they resided in the State of

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Ohio, and before he became the owner of the land in dispute in this case, he and his first wife, by proceedings in the probate court of Huron county, Ohio, duly adopted the appellee as their child. After such adoption his first wife died, and John Krauss afterwards remarried to Hanna Krauss, and became the owner of the land in question; that after said John Krauss died his widow sold the land to the appellant, the appellant paid for the same, and the widow conveyed the land to him; that after the appellant had purchased and paid for the land, and received a conveyance for the same, and the widow had died, the appellee filed, in the clerk's office of the Washington Circuit Court, a transcript of the record of his adoption by John Krauss and his first wife, in the probate court of Huron county, Ohio, and is thereby claiming the land and disputing the appellant's title.

It is averred that John Krauss died in 1889, whether before or after the amendment of section 2487, R. S. 1881, does not appear, and is immaterial.

In my opinion some of the sections of our statute recognize a difference between a natural and adopted child, and admitting for the purpose of the decision of the other question, that the proceedings in the filing of the transcript of the record of adoption in the clerk's office of the Washington Circuit Court were regular and in due time, and gave to the appellee all the rights he could have by any possibility acquired by a strict compliance with the provisions of section 829, R. S. 1881, I can not agree that the widow took only a life-estate in the land, or that at her death it descended to the adopted son. It is the theory of our law of descent that the widow of a decedent shall be liberally provided for. Dower has been abolished, and a fee simple in one-third, and in some instances even a more liberal allowance, is given in its stead. Section 2490, R. S. 1881; gives to the surviving husband or wife the whole of the intestate's estate, real and personal, in case such intestate leaves no child and no father or mother surviving. Section 2486 gives to

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the widow one-half of the estate of the husband in case he die intestate, leaving but one child. In the case at bar, if either section 2486 or 2490 govern, the widow would take one-half of the whole, and they must and do control unless the inheritance is governed by some other section or sections of the statute inconsistent therewith. The proviso to section 2487 declares that "if a man marry a second or other subsequent wife and has by her no children, but has children alive by a previous wife, the land which, at his death, descends to such wife, shall, at her death, descend to his children." This section is amended by the act of 1889, Elliott's Sup., section 423, to limit the wife's inheritance in such case to a life-estate. The widow in the case at bar being dead at the time suit was brought, if either provision is applicable the adopted son would be the owner in fee at that time. I can not agree to such an interpretation of the statute. In my judgment section 2487, *supra*, and the amended section 423 relate to and apply only when there are natural children born to the husband by a former wife, who survives him. This section has no relation to adopted children or their inheritance. It simply puts a limit on the amount taken by a second or subsequent wife, and is intended to limit such estate to be taken by her only in case the husband leaves surviving him a child or children by a previous wife.

A child by adoption is not a child by a wife. A child by adoption is made the child of the adopting parent, or parents, by legal proceedings—by operation of law.

It is suggested that the adopted child is, by section 825, made to stand in the attitude, having all the rights of a natural child. This section provides that "It shall take the name in which it is adopted, and be entitled to and receive all rights and interest in the estate of such adopted father or mother, by descent or otherwise, that such child would do if the natural heir of such adopted father or mother," and it is contended that to hold that it does not take the whole estate in preference to a widow who is a second or subsequent

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wife, nullifies the provisions of this section, but with this we can not concur. Full force and effect may be given to this section by a construction of the statute simply holding that he is the child of his adopting father, but not a child born of a wife, or what is equivalent, a child by a previous wife. If the statute be so construed as to hold that he is the child of the deceased husband, then he takes one-half of the estate, for section 2486, *supra*, provides: "If a husband die intestate, leaving a widow and one child only, his real estate shall descend one-half to his widow and one-half to his child," and such a construction is entirely consistent with section 2490, which declares the surviving husband or wife shall take the whole of the estate when no child and no father or mother survive. Such a construction gives full force to the statute authorizing the adoption of children, but to hold that the adopted son is a child by a wife is, in my judgment, absolutely inconsistent with the language used in the statute, and likewise inconsistent and contrary to the will of the Legislature.

The sections of the statute of descents dividing the estate of an intestate between the widow and children make no distinction between the natural and adopted children in case there is but one child of the husband. Whether that child be natural or adopted the widow and the child each take one-half; if there be more than one child the widow takes one-third, but section 2487, and the sections amendatory thereof, which limits the widow's interest in certain cases to a mere life-estate, expressly provide that such limitation shall only take place where the husband has children alive by a previous wife, clearly expressing the intention that such limitation should not take place except there were natural children born of a former wife. If the intention had been as interpreted by the majority opinion, it would have been fully expressed by the omission of the words "by a previous wife," leaving the section to read, "that if a man marry a second or other subsequent wife, and has by her no

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children, but has children alive, the land which at his death descends to such wife shall at her death descend to his children. It is clear to my mind that the words "by a previous wife" were inserted in the statute for a purpose, and as clearly expressing the legislative intention that the wife's estate should only be limited in case there were natural children born to the husband by a previous wife, and certainly there are no reasons for placing an unnatural or forced construction on the statute favorable to an adopted child as against the second or subsequent wife.

Conceding, without expressing an opinion, that the proceedings in the matter of adoption are regular, in my opinion the widow and the adopted child each took one-half of the land in fee, and the judgment should be reversed on the ruling of the court in sustaining the demurrer to each paragraph of the complaint.

Filed Oct. 5, 1892.

DISSENTING OPINION.

COFFEY, J.—I can not concur in the conclusion reached in this case. By no course of legitimate reasoning can the conclusion be reached that a child by adoption is a child by a former wife.

Filed Oct. 5, 1892.

No. 15,914.

DAVIS, ADMINISTRATOR, v. KELLY.

132	309
141	532

DECEDENTS' ESTATES.—*Real Estate by First Marriage.*—*Children Surviving.*—*Not Subject to Debts Contracted During Second Marriage.*—Where a widow re-marries, holding real estate by virtue of her previous marriage, and there are children alive by such first marriage, such real estate can not, after her death, be sold by her administrator to make assets for the payment of debts contracted during her second marriage.

From the Fulton Circuit Court.

G. W. Holman and R. C. Stephenson, for appellant.

J. C. Nye and R. A. Nye, for appellee.

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COFFEY, J.—James Bennett died intestate, the owner of the land in controversy in this suit, leaving Hannah Bennett as his widow, and children alive by her. She subsequently intermarried with John B. Shaffer, and died during the existence of such second marriage. The land involved in this suit was set off to her as her share in the lands of James Bennett, her first husband. During her second marriage she contracted certain debts, and died leaving them unpaid. This was an application by her administrator to sell the land which descended to her from her first husband to make assets with which to pay the debts contracted during the existence of the second marriage. It was held by the circuit court that the land was not subject to sale for the payment of such debts. The assignment of error calls in question the correctness of this ruling.

Section 2484, R. S. 1881, provides that "If a widow shall marry a second or subsequent time, holding real estate in virtue of any previous marriage, and there be a child or children or their descendants alive by such marriage, such widow may not, during such second or subsequent marriage, with or without the assent of her husband, alienate such real estate; and, if such widow shall die during such marriage, such real estate shall go to such children by the marriage in virtue of which such real estate came to her, if any there be."

In the case of *Philpot v. Webb*, 20 Ind. 509, upon the authority of which the appellant here relies for a reversal of the ruling of the circuit court, Mrs. Wagoner, while a widow, became indebted to Webb and then intermarried with one Henderson. During the second marriage she died, and it was held by this court that the land which came to her by her first husband was liable for the payment of the debt she contracted prior to her second marriage. There is much justice in this holding, for it would be unreasonable to adjudge that she could defeat the collection of her just debts by contracting a second or subsequent marriage. But in the

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later case of *Smith v. Beard*, 73 Ind. 159, it was held that the land which a widow takes from her first husband, where she has children alive by him, can not be sold on execution during the existence of a second or subsequent marriage, even for the payment of a debt contracted during widowhood. This case is based upon and follows the case of *Schlemmer v. Rossler*, 59 Ind. 326. In the latter case it was said by this court: "The object of the statute seems to be two-fold, first, to protect a woman who has thus received real estate by virtue of a former marriage from improvident and injudicious alienations thereof during a second or subsequent marriage, and, second, to preserve the property for the children of the marriage in virtue of which she received it where there are such children, in case of her death during such second or subsequent marriage."

If she could so encumber the property by contracting debts during the existence of the second marriage as to require its sale upon her death for their payment, one of the purposes of the statute would be defeated, for it could not be said that the property was preserved for the children by the former husband if it could be sold to pay such debts. So far as the result affects the children of the former husband, there would be no difference between permitting the mother to alienate the land during the existence of the second marriage and selling it, after her death, for the payment of debts contracted during such marriage. The children would lose the land in either event. In our opinion the land in controversy is not subject to be sold to make assets for the payment of debts contracted by Mrs. Shaffer during her second marriage. As bearing upon the question now under consideration, see *Flenner v. Travellers' Ins. Co.*, 89 Ind. 164; *Bryan v. Uland*, 101 Ind. 477; *Wright v. Wright*, 97 Ind. 444; *Erwin v. Garner*, 108 Ind. 488.

Judgment affirmed.

Filed Oct. 4, 1892.

File et al. v. Springel.

No. 15,818.

FILE ET AL. v. SPRINGEL.

PRACTICE.—Motion to Separate Causes of Action.—Demurrer for Misjoinder of Causes.—A complaint was filed containing two paragraphs, the first charging the fraudulent taking of plaintiff's money and property and appropriating the same to the purchase of real estate, and taking the title to the same in the name of the defendant's wife, and praying for a judgment and that a lien be declared on the real estate; the second paragraph asked for a judgment for the money so appropriated. A motion was made to require the causes of action to be separated, which was overruled. A demurrer to the complaint on the ground of a misjoinder of causes of action was overruled.

Held, that the rulings of the court were harmless, and constituted no reversible error.

SAME.—Judgment.—Evidence Supporting.—Where there is evidence tending to support the finding, the judgment will not be reversed.

SAME.—Evidence.—Harmless Error.—If evidence is erroneously admitted, and it works no harm to the adverse party, it will not be a cause for reversal.

SAME.—Evidence.—Rebuttal.—What Competent.—Where the defendants testified in relation to their property, it was not error to allow evidence to be introduced concerning an inventory of his property filed by one of the defendants asking exemption from sale on execution, also concerning a mortgage executed by defendants.

SAME.—Parol Evidence.—Contents of Record.—Where one testified to having a mortgage, that he commenced foreclosure proceedings, and that he afterwards took a conveyance of the mortgaged property, paying a difference of sixty dollars to the mortgagors, it was not error to admit such evidence, as it was not proof of the contents of the record.

From the Vanderburgh Circuit Court.

V. Bisch and C. L. Wedding, for appellants.

S. R. Hornbrook and P. Maier, for appellee.

OLDS, J.—The appellee, Louis Springel, brought this action against the appellants, Josephine File and William F. File, her husband.

The complaint is in two paragraphs—the first charging the fraudulent taking of appellee's money and property, amounting to some twenty-five hundred dollars, and appro-

File et al. v. Springel.

priating the same to the purchase of real estate, and taking the title to the same in the name of Josephine File, and asking judgment, and to have a lien declared on the real estate so purchased; the second paragraph asking for judgment for the money so appropriated by appellants. Issues were joined on the complaint, and a set-off pleaded to the amount of \$914.70. There was a trial by the court, resulting in a judgment in favor of the appellee for seven hundred and fifty dollars, and a decree that the same was a lien on the real estate.

The appellants first moved the court to require the causes of action to be separated, which was overruled, and the appellants then filed a demurrer to the complaint, stating as a cause of demurrer that there was a misjoinder of causes of action, and the demurrer was overruled.

These rulings of the court were harmless, and constitute no error for which the judgment can be reversed.

The next error assigned and discussed relates to the ruling of the court in overruling the motion for a new trial. It is insisted that there is no evidence to support the finding by the court, either as to the amount of damages assessed, or that the money converted was used in the purchase of the real estate, the title to which was taken in the name of Mrs. File. We have read the evidence, and can not concur in this theory of counsel for the appellants.

It is true the evidence is contradictory. The stories related by some of the witnesses, both for the appellee and the appellants, are of such a character as to appear somewhat unreasonable, and lead one to doubt the truthfulness of them. It is a case illustrating the wisdom of the well settled rule of this court that it will not weigh the evidence when it is contradictory; that the court trying the cause is best able to judge of the credibility of the witnesses and arrive at the real truth in the case.

There is evidence to sustain the theory that the appellants were acting in conjunction and in harmony in obtaining the

custody of the money from the appellee and in using it for the purchase of the real estate, taking the title in the name of Mrs. File. There is also evidence tending to support the finding of the court that the money received from the appellee was used in the purchase of the real estate.

The appellants testify to having various other sums of money of their own, but the evidence relating to this was of such a character that the court may have discredited and disbelieved it.

There is no such failure of evidence to support the finding as to justify a reversal of the judgment on this account.

It is next urged that the court erred in allowing one Victor Bisch, a witness on behalf of the appellee, to testify to a statement made by one Walker when testifying as a witness in the trial of a certain proceeding supplemental to execution in the case of *Wassem et al. v. Springel et al.*, to the effect that he had made an entry on the bank books of the bank with which he was connected upon Mrs. File's account, in the words, "Do not tell any body, because Mrs. File had told him not to tell any body at the time she left the money."

It is unnecessary to determine whether this ruling of the court was error or not, for if error it was harmless, as Mrs. File herself admitted when on the witness-stand that she did make such statement. There is no controversy about the fact that she made such statement, and certainly no harm resulted to the appellants on account of the statement made by the witness Bisch.

It is also contended that the court erred in admitting certain evidence, of an inventory filed by the appellant William P. File of his property, asking an exemption of his property from sale on execution, also the introduction of a mortgage executed by the appellants to one W. H. File. In view of the testimony of the appellants in relation to their property, this evidence was competent, and there was no error in the admission of it. It is further contended that the court erred in allowing John Waltz to testify about his hav-

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ing a mortgage, the commencement of a suit in foreclosure, and that he afterwards took a conveyance of the property, paying Mrs. File \$60, on the grounds that such testimony related to matters of record, and could be best proven by the record.

The contents of the record and the deed could not be proven by parol, but it was not error to permit the witness to testify to the fact that he held a mortgage, that he commenced a suit, and afterwards accepted a deed for the property, paying Mrs. File \$60.

We have carefully examined all the questions presented in the case, and find no error for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Oct. 5, 1892.

No. 16,508.

TOWNSEND v. THE STATE.

CRIMINAL LAW.—*Trial by Less than Twelve Jurors.—Affidavit.—Bill of Exceptions.*—In a prosecution for a criminal offence, where it was alleged as a ground for a new trial that during the progress of the cause two of the twelve jurors selected by the parties were discharged by the court by reason of illness, and that the verdict was rendered by the remaining ten jurors, and there was what purported to be an affidavit in support of the charge, but no reference was made to the same in the motion for a new trial, and it was not embraced in the bill of exceptions, the question is not properly presented on appeal.

From the Owen Circuit Court.

J. W. Williams, for appellant.

A. G. Smith, Attorney General, for the State.

COFFEY, J.—The appellant was indicted in the Owen Circuit Court for the alleged crime of assault and battery with

132	315
137	287
132	315
143	301
132	315
145	623
132	315
148	529

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intent to commit a felony, and the crime of malicious mayhem. Upon a trial of the cause he was found guilty by a jury, upon whose verdict the court gave judgment. He appeals to this court, and assigns as error that the circuit court erred in overruling his motion for a new trial. It was assigned as one of the reasons for a new trial that during the progress of the cause two of the twelve jurors selected by the parties were discharged by the court by reason of illness, and that the verdict was rendered by the remaining ten jurors. This is the only matter argued in this court by the counsel for the appellant, his contention being that a verdict in a criminal case by less than twelve jurors is a nullity. In answer to this contention it is urged by the attorney general that it does not appear by the record that the appellant was tried by ten jurors only, but, on the contrary, it appears that he was tried by twelve. This renders it necessary to examine into the state of the record before us.

It appears from the clerk's entry, signed by the presiding judge, that twelve jurors were empanelled to try the cause. As we have seen, it was assigned as one of the causes for a new trial that two of the jurors so empanelled were discharged by the court while the trial was in progress, but no reference is made in the motion for a new trial to any affidavits in support of the charge. Thirty days' time was given by the court in which to file a bill of exceptions. The bill filed contains the following language :

"Be it remembered that, on the 18th day of January, 1892, the same being the nineteenth day of the December term, 1891, of this court, the following pleas and proceedings were had before the Hon. George W. Grubbs, sole judge of said court. The defendant filed his motion and reasons for a new trial, which motion and reasons are as follows (see transcript from page 9 to 17, inclusive), which motion and reasons for a new trial said court overruled, to which ruling of the court the defendant at the time excepted."

There is on the pages referred to in the record a copy of

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what purports to be an affidavit in support of this reason for a new trial, copied by the clerk into the record. The affidavit appears in the record in no other manner.

This affidavit, not being embraced in the bill of exceptions, can not be considered by us. We have no means of knowing that it was ever presented to the court in support of the motion for a new trial, or that the court ever saw it. To authorize us to consider it, it should be embodied in a proper bill of exceptions signed by the judge. *Meredith v. State*, 122 Ind. 514; *McClure v. State*, 116 Ind. 169; *Wood v. Crane*, 75 Ind. 207; *Stott v. Smith*, 70 Ind. 298; *McDonald v. State*, 74 Ind. 214.

There being no affidavit properly in the record supporting this reason for a new trial, we must assume, in favor of the action of the circuit court, that it did not in fact exist.

Judgment affirmed.

Filed Sept 16, 1892.

No. 16,482.

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CRIMINAL LAW.—Prosecution for Murder.—Administration of Poison.—Declarations of Decedent.—Res Gestæ.—Where the defendant was indicted for murder, for administering poison in liquor to the deceased, it was proper on the trial of the charge to admit in evidence complaints of the deceased made shortly after taking the liquor that it was bitter, and accusing the defendant of having put quinine in it, the complaints having been made while the defendant was within hearing, and there being evidence that he heard the same, although he denied hearing them.

SAME.—Declarations of Deceased After Occurrence.—Inadmissibility of.—Declarations made by the deceased to his wife, in the absence of the appellant and some time after the occurrence, to the effect that the appellant had invited him to take a drink of blackberry wine, and that it was very bitter, etc., were not admissible in evidence. They were so separated from the act as to be merely narrative of what had occurred, and did not constitute a part of the *res gestæ*.

132	317
135	2
136	290
132	317
137	434
132	317
154	658
132	317
167	368

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SAME.—Dying Declarations.—Such declarations or facts stated by the deceased, which he would be permitted to testify to if a witness, are admissible as dying declarations, the conditions existing which permitted of the introduction of his dying declarations in evidence.

SAME.—Reputation of Defendant for Peace and Quietude.—Use of Word “Inoffensive”.—Evidence of the general reputation of the accused for peace and quietude is admissible in a prosecution for murder, though the murder may have been committed by poisoning. The use of the word “inoffensive” as well as the words “peace” and “quietude” in interrogating the witness was not objectionable.

SAME.—Evidence.—It was not error to refuse to permit the defendant to prove that he had drank liquor with the deceased out of a bottle marked “poison,” taken from the barn, and that the deceased said at the time that he marked the bottle and put whisky in it, and put it in the barn in order that his hired men would not know where it was, and in order that the women folks would not “catch on” to it, and to prove that he had other bottles at the same place, it not appearing when this occurred nor that at the time of the taking of the drink and death of the deceased he kept bottles in such manner at the barn, and from which he might have drank by mistake.

SAME.—Suicidal Tendency of Deceased.—Facts not Tending to Prove.—It was not proper for the defendant to offer in evidence isolated facts as to the financial condition or domestic troubles of the deceased which would not show any suicidal tendencies on his part.

SAME.—Counsel to Assist Prosecution.—Appointment of in Absence of Defendant.—The court may appoint counsel to assist in the prosecution of a felony in the absence of the defendant, this being no part of the trial.

From the La Grange Circuit Court.

A. Ellison and A. A. Chapin, for appellant.

A. G. Smith, Attorney General, and J. T. Sullivan, for the State.

OLDS, J.—The appellant, Martin Hall, was indicted for the murder of one Sheridan E. Hughes, by administering poison to him.

There was a trial resulting in a verdict of guilty of murder in the first degree, and fixing the appellant's punishment at imprisonment in the State prison during life. Numerous errors are assigned. The contention on the part of the State was that the appellant invited the deceased to take a drink of liquor from a bottle which he had, and the deceased did

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drink from the bottle, and that there was strychnine in the liquor.

The deceased lived upon a large farm in La Grange county, his family consisting of his wife and child and mother-in-law, Mrs. Wallace, and himself. The farm, of four hundred acres, well improved, was owned by Mrs. Hughes and her mother, Mrs. Wallace. The deceased was about twenty-four years of age, in good health, and managed the farm, farming quite extensively and dealing in horses,—buying, selling and trading them. The defendant was a man about twenty-eight years old, and during the summer, prior to the death of Hughes, on the 16th day of September, 1891, he had been working for the Hughes, and had rented a field for wheat of him, and had been cutting corn for him, and he kept a horse and buggy there. On the morning of the 16th day of September, 1891, Mr. Hughes had two or three other young men working for him. There were also a Mr. Dill and his hired man, who were travelling across the county with a number of horses, and were camping near the house, at Mr. Hughes', on this morning. After breakfast Mr. Hughes had his team hitched to the buggy preparatory to going to town, and before going was transacting some business or completing a horse trade with Mr. Dill, and the other young men were getting ready to go to work. They were all about in the vicinity of the barn. The appellant was there also cleaning out his buggy and hitching up his horse preparatory to going away. After hitching his horse to his buggy, the appellant took a quart bottle, with what is said to be cherry wine and whisky, to the house. Mrs. Hughes tasted it and Mrs. Wallace drank of it and he left the bottle at the house. He then went back to the barn where his horse and buggy were and held up a small flask and invited Mr. Hughes to drink with him. Hughes came to the buggy, and in the presence of two of the hired men Hughes suggested to appellant that he drink first, and appellant took the bottle and placed it to his lips as if taking a drink. As

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to whether he did in fact drink is controverted. He then handed the bottle to Hughes, and he drank all there was in the flask except a teaspoonful or thereabouts and returned the bottle to the appellant, and he broke it on a stone at the edge of the barn. Hughes then stepped away from the buggy by the side of the barn, and appellant got into his buggy and drove out into the road a short distance from the barn. The evidence is conflicting as to the distance, witnesses placing it from fifteen rods to probably twice that distance. When he got into the buggy he spoke to one of the other hired men and asked him if he was going to the corn-field to cut corn, and on his replying that he was, he invited him to ride, and he stopped in the road waiting for him, and remained there some minutes.

Soon after Hughes took the drink he began complaining of its being bitter, and commenced spitting and soon after complained of being sick. Just the length of time after he took the drink that he began to complain is in dispute, but witnesses testify that it was while appellant remained waiting in the highway, and that he addressed appellant in a loud voice, accusing him of having quinine in the liquor. The appellant disclaims having heard him say anything about it or make any complaint. The appellant soon drove on and went to his father's, near to Kendallville, some twelve miles or more distant, where he was followed in the afternoon and advised of the death of Hughes. There is evidence tending to show that appellant heard what Hughes said while appellant was waiting in the road. Other witnesses an equal distance away testify to hearing what Hughes said. Hughes died from one to two hours after taking the drink. The declarations of Hughes from the time he drank from the bottle up to his death were admitted in evidence over the objection of the appellant. There were three classes of declarations of Hughes admitted in evidence.

First. Those made while the evidence tended to show that the appellant was within hearing distance.

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Second. Those made after the appellant had departed and not made in view of approaching death, so as to be admissible as dying declarations.

Third. Dying declaration made after the deceased believed he would die in a very short space of time.

As to the first class of declarations, they were clearly competent. There was evidence tending to show that the appellant was within hearing distance and heard what Hughes said, and it was for the jury to determine whether or not he did in fact hear them.

The second class of declarations were of this character: Mrs. Hughes was testifying as a witness, and in answer to questions she testified that her husband, the deceased, on coming to the house, said that the appellant called him around the corner of the barn and asked him if he did not want a drink of blackberry wine. He said there was quinine in it, that it was very bitter, that it was an overdose of quinine; it was grainy; said he felt the grains as they went down his throat.

Under the well-established rule in this State these declarations were inadmissible. They were surely narrative of a past transaction made to the wife when Hughes came to the house in the absence of the appellant and some time after the occurrence. The exact length of time is disputed, possibly only ten or fifteen minutes after taking the drink. The exact time we do not deem material, but the declarations were separated from the act so that they became a mere narrative. If admissible at the time they were made, they would have been admissible at a much longer time afterwards if the deceased had lived.

In *Binns v. State*, 57 Ind. 46, it is held that declarations which are simply the narrative of a past event, depending solely for its effect upon the credit of the party making it, and not so connected with the main facts as to illustrate its character, are not competent evidence. The declarations

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in that case, held to be inadmissible, are not materially different from those admitted in this case, and made quite as soon after happening of the event. In that case the deceased was shot, and she said "she was stooping down putting wood in the stove at the time of the occurrence, and the shot came from outside through the window, and she was stooping down fronting the window immediately fronting the stove at the time of the occurrence." This decision has been followed and approved by the subsequent decisions of this court. *Montgomery v. State*, 80 Ind. 338.

In *Jones v. State*, 71 Ind. 66, a witness testified that after the deceased was shot he first directed that a doctor be sent for, and that in five or six minutes after that he said Prince Jones shot him. This declaration was held to be inadmissible as a part of the *res gestæ*. The court in that case says: "It may not be necessary that the declaration should be strictly contemporaneous with the main fact in order to be admissible, * * * but all the authorities agree, so far as we are advised, that a declaration which amounts to no more than a mere narrative of a past occurrence is not admissible."

In the case of *Doles v. State*, 97 Ind. 555, the same rule is announced, and statements of the deceased to the effect that he had been waylaid by a person, naming him, and that he had hurt him, were held incompetent.

In *Stephenson v. State*, 110 Ind. 358, the decisions are collected and cited, and the same rule is adhered to.

The same rule that admits the statements of the deceased as a part of the *res gestæ* admits the statements of the defendant, for they are admissible on the theory that they are a part of the transaction,—the verbal act of a party explanatory of a concurring physical act, or, as is sometimes said, it is the transaction speaking through the party, but this can only occur when the declaration is made at the time in connection with the act. A declaration made after the act

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is completed, relating what took place, is a mere narrative of what occurred, and is not a part of the *res gestæ*.

Some decisions of other courts may be found holding such declarations admissible, but under the decisions in this State, which are in accordance with the weight of authority, it was clearly error to admit the second class of declarations of the deceased.

As to the third class of declarations admitted as dying declarations, all we deem it necessary to say is that the rule is well settled that such declarations or facts stated by the deceased which he would be permitted to testify to if a witness, are admissible. *Montgomery v. State, supra*; *Boyle v. State*, 105 Ind. 469. These rules are so well settled that it seems unnecessary to discuss these questions at greater length.

The appellant offered to prove his general reputation for peace and quietude, and the court excluded it. In this the court committed an error. Evidence of the general reputation of the accused for peace and quietude is permissible in a prosecution for murder, though the murder may have been committed by poisoning. In a criminal charge the accused has the right to prove a character which would make it unlikely that he would be guilty of the particular crime with which he is charged. Wharton Crim. Ev. (9th ed.), section 60.

It is said in *Warner v. State*, 114 Ind. 137, that "An assault is a constituent element of the crime of murder." This is true though it be accomplished by the administering of poison, for the administering of poison is an assault. Cooley Torts (2d ed.), p. 88, section 164; *Commonwealth v. Stratton*, 114 Mass. 303; 1 Am. and Eng. Encyc. of Law, p. 804.

The party puts in motion an instrument of death. It matters not whether that instrument be a bludgeon wielded by the party himself, or the igniting of an explosive substance, the firing of a gun putting the ball in motion which penetrates the body, or the administering of poisonous drugs, which produce death. In either case the party puts in mo-

tion a force or power that produces death, and in either case it is the act of the party producing death, for which he is responsible, and for the doing of which and destroying life he is punished. A trait of character which would be inconsistent with the destruction of life by one method would be inconsistent with a disposition to take life by another. The object sought is to take life, whether it be accomplished by one method or another, and it has been held that proof of the general character of the accused for peace and quietude is admissible when he is on trial charged with murder, on the theory that one possessing such a character would be less likely to commit murder than one who did not possess those traits of character.

In this case in some of the interrogatories propounded the word "inoffensive," as well as the words "peace" and "quietude," were used. This is but another word to express the same trait of character, for to say that one was an inoffensive person would, we think, convey the impression that he was a peaceable and quiet person.

The appellant offered to prove by one O'Brien that he had drunk liquor out of a bottle with the deceased taken from the bottle marked "Poison," and that the deceased said at the time that he marked the bottle and put whisky in it and put it in the barn in order that his hired man would not know where his whisky was or be able to drink it, and in order that the women folks would not "catch on" to it, and to prove that he had other bottles at the same place. This evidence was offered on the theory that the deceased might himself have gone into the barn and made a mistake and taken a drink out of the wrong bottle and by mistake or accident taken poison. There was some other testimony in the case to the effect that deceased kept a number of bottles at the barn, some of them marked "Poison." As this offer appears in the record, there was no error in excluding this evidence. It does not appear where this occurred, nor does the appellant seek in connection with this evidence to follow it up

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by showing that at the time of the taking of the drink and death of the deceased he kept bottles in such manner at the barn. It was undoubtedly proper to show, if such was the fact, that Hughes had been in the habit of keeping bottles of medicine with poison in them and marked "Poison" at the barn, and in connection with such bottles kept bottles of whisky marked "Poison," showing an opportunity for him to have taken poison by mistake, and to show, if such was the fact that the deceased had in his possession such poisons as produced his death.

The appellant offered to make some proof as to the financial condition of the deceased, and as to his domestic relations, tending to show infidelity and neglect on his part. We deem it unnecessary to set out and consider the several items of evidence of this character offered and excluded. There does not seem to be any such surroundings in the case, or anything in the life or character of the deceased, or in the facts or circumstances surrounding his death, as to make this evidence admissible. It does not seem to us that if all of the evidence of this character that was contended for was admitted it would shed any light upon the question as to what caused the death of Hughes, or if produced by poison as to how, when, or in what manner he received it. There is, we think, nothing in the evidence offered and excluded relating to his financial and domestic relations, if all was admitted, to show any suicidal tendencies on the part of the deceased.

Proof of traits of character in the deceased, if any existed, showing a suicidal tendency might be made, but such was not the character of the evidence offered. Isolated facts as to financial condition or domestic trouble are collateral, and not competent to be given in evidence. The evidence as to the deceased's finances and domestic relations was properly excluded.

A question is presented as to the correctness of the instructions given by the court, also in regard to the action

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of the court in refusing instructions requested by the appellant. There may be some doubt as to the correctness of the action of the court in the giving and refusal of instructions, but we deem it of no benefit to critically examine and pass upon the correctness of the court's rulings in this respect, as upon a retrial new instructions must be given, and there is no new principle involved requiring a decision. A question is presented in regard to the assignment of counsel by the court to assist in the prosecution, this being done in open court, in the absence of the appellant. As soon as the appellant was advised of the fact the appellant moved the court to strike out and revoke the appointment. There was no error in this. The court had the power to appoint counsel, and it was not a part of the trial. There was no abuse of discretion shown. The court might make the appointment of counsel to assist in the prosecution in the absence of the defendant. *Epps v. State*, 102 Ind. 539; *Tull v. State, ex rel.*, 99 Ind. 238.

Some other questions are presented which it is unnecessary to decide, as they may not arise on the retrial of the case.

For the errors hereinbefore stated, the judgment must be reversed.

Judgment reversed, with instructions to grant a new trial, and the clerk is directed to issue the proper order for the return of the appellant.

Filed June 9, 1892; petition for a rehearing overruled Oct. 5, 1892.

Pouder *et al.* v. Tate.

No. 15,563.

POUDER ET AL. v. TATE.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.—*Fund in Sheriff's Possession.*—*Wrongful Transfer by Him.*—*Supplemental Complaint Showing the Fact.*—

When May be Filed.—Where proceedings supplementary to execution were instituted, and the fund which the plaintiff was endeavoring to reach had been paid into the hands of the sheriff, and the sheriff, without the consent of the plaintiff, and without any order of the court authorizing him to do so, transferred the fund to one of the parties to the suit who was insolvent, it was proper that the court should be informed of that fact by supplemental complaint, and it was not error for the court to permit the filing of such supplemental complaint after the evidence was introduced and while the court was holding the cause under advisement, it being averred that the plaintiff had no knowledge of the transfer of the fund until the day before the trial of the cause commenced.

SAME.—*Evidence.*—The payment of the fund by the sheriff to one of the parties to the suit without the order of the court, or the consent of the plaintiff, was wrongful, and it was proper to treat him as still in the custody of the fund, and to require him to pay the same to the appellee or his attorneys of record. Documentary evidence was admissible that tended to prove that the fund in question was held by the sheriff as the custodian of the court.

PLEADING.—*Filing of Supplemental Complaint.*—*Discretion of Court.*—A supplemental complaint is an additional complaint consisting of facts arising after the filing of the original, and it and the original constitute the complaint in the cause. It is largely within the discretion of the trial court to allow the filing of additional pleadings after the issues are closed.

From the Marion Superior Court.

A. T. Beck, for appellants.

F. Knefler, J. S. Berryhill, F. Winter and J. B. Elam, for appellee.

COFFEY, J.—The appellee, Warren Tate, recovered a judgment in the Hamilton Circuit Court on the 24th day of December, 1882, for the sum of \$15,589.72 against the appellant Milton Pouder, together with a decree foreclosing a mortgage upon certain described real estate, situate in Ma-

132	327
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rion county, executed to secure the payment of the notes upon which the judgment was rendered. Upon a sale of the mortgaged premises by the sheriff, on a certified copy of the decree, the judgment was credited with \$11,749.35. On the 6th day of December, 1883, the appellee caused an execution to be issued on the remainder of said judgment, directed and delivered to the sheriff of Marion county, where the appellant Milton Pouder resided; but the sheriff being unable to find any property upon which to levy, proceedings supplementary to execution were commenced in the Marion Superior Court on the 13th day of February, 1884. Such proceedings were had in the cause as that it was decreed by the court, among other things, that Ritzinger's Bank should pay over, to be applied towards the satisfaction of the execution in the hands of the sheriff of Marion county, the sum of \$610.31, deposited in the name of Georgia Pouder. From this decree an appeal was prosecuted to this court, where it was reversed on account of the insufficiency of the complaint. *Pouder v. Tate*, 111 Ind. 148.

On the 18th day of June, 1887, the appellee filed an amended complaint, upon which the appellants Milton Pouder and Georgia Pouder joined issue and submitted the cause to the court for trial. After the evidence was introduced, and while the court was holding the cause under advisement, the appellee applied for and obtained leave of the court to file a supplemental complaint making the appellant Isaac King a party defendant to the suit. The supplemental complaint alleges, among other things, that before the appeal of this cause to the Supreme Court a certified copy of the decree rendered therein was issued to Hess, the sheriff of Marion county, upon which Ritzinger's Bank turned over to him the \$610.31 on deposit in the name of Georgia Pouder; that said Hess held the same, subject to the order of the court upon a final hearing of the cause, until the expiration of his term of office, when he turned the same over to his successor Carter; that Carter likewise held the same until

Pouder *et al.* v. Tate.

the expiration of his term of office, when he turned the same over to his successor, the appellant Isaac King; that, on the — day of August, 1887, and after the filing of the amended complaint, King, without the knowledge or consent of the appellee, and without any order of the court therefor, paid the same over to the appellant Georgia Pouder, who is insolvent, taking from her a good and sufficient bond to indemnify him against loss, and that the appellee had no knowledge that King had parted with said money until the day before the trial of this cause commenced.

Upon a final hearing of the cause the court decreed, among other things, that the appellant King should forthwith pay over the said sum of \$610.31 to the appellee or his attorneys, to be credited upon the appellee's judgment rendered in the Hamilton Circuit Court.

Upon appeal to the general term of the Superior Court several errors were assigned, only three of which are discussed in the briefs filed here, namely:

First. That the court erred in permitting the appellee to file a supplemental complaint.

Second. That the court erred in overruling the motion of the appellants for a new trial.

Third. That the court erred in overruling the motion of the appellants to modify the judgment and decree rendered in the cause.

Section 399, R. S. 1881, provides that "The court may, on motion allow supplemental pleadings, showing facts which occurred after the former pleadings were filed."

A supplemental complaint is an additional complaint consisting of facts arising after the filing of the original, and it and the original constitute the complaint in the cause. *Musselman v. Manly*, 42 Ind. 462; *Martin v. Noble*, 29 Ind. 216; *Farris v. Jones*, 112 Ind. 498; *Peters v. Banta*, 120 Ind. 416. It is largely within the discretion of the trial court to allow the filing of additional pleadings after the is-

Pouder et al. v. Tate.

sues are closed. *Gardner v. Case*, 111 Ind. 494; *Louisville, etc., R. W. Co. v. Hubbard*, 116 Ind. 193.

The appellee in this case was seeking to reach and apply to the payment of his debt the fund now in controversy, which he alleged the appellants were unjustly withholding. By the commencement of his suit and the service of the notice on Ritzinger's bank, he acquires a lien on the fund, and the appellant King could in nowise affect that lien by any act of his without the consent of the appellee. *Graydon v. Barlow*, 15 Ind. 197; *Cooke v. Ross*, 22 Ind. 157; *Hutchinson v. Trauerman*, 112 Ind. 21; *Bush v. Bush*, 46 Ind. 70; *School Town of Monticello v. Grant*, 104 Ind. 168.

As the appellant King, without the consent of the appellee, and without any order of the court authorizing him to do so, transferred the fund to one of the parties to the suit who was insolvent, we think it was eminently proper that the court should be informed of that fact by supplemental complaint, to the end that it might render such decree in the case as would make the appellee's suit availing.

The court did not err, in our opinion, in permitting the appellee to file a supplemental complaint in this cause.

During the progress of the trial numerous objections were made by the appellants to the introduction of evidence offered by the appellee, each of which we have carefully considered, and find no available error in the rulings of the court thereon. The documentary evidence to which objection was made tended to prove that the fund in question was held by the sheriff of Marion county as the custodian of the Marion Superior Court, and was admissible for that purpose. The evidence tends to support the finding of the court.

The appellants moved the court to modify the decree entered in the cause by striking therefrom so much as required the appellant King to pay the appellee or his attorneys of record the fund in controversy, to be applied as a credit on the appellee's judgment.

We do not think the court erred in overruling this motion.

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The payment of the fund by King to one of the parties to the suit, without the order of the court or the consent of the appellee, was wrongful, and the court did right in treating him as still in the custody of the fund.

There is no available error in the record.

Judgment affirmed.

Filed March 31, 1892; petition for a rehearing overruled Sept. 16, 1892.

No. 15,734.

ADAMS v. SHAFFER ET AL.

MECHANIC'S LIEN.—*Action to Foreclose.*—*What Notice Must Contain.*—

Notice to Owner Must be Proved.—*Averment as to Notice in Complaint.*—

Where material is furnished to a contractor, the notice of an intention to acquire a mechanic's lien, given under section 1690, Elliott's Supp. (Acts 1883, p. 141), need not contain a recital showing that notice had also been given to the owner in accordance with section 5 of said act. In an action to foreclose the lien, however, it must be averred in the complaint and proved on the trial that such notice was given.

SAME.—*Notice With Endorsement.*—*Admissible in Evidence.*—It was not error to admit in evidence the original notice with the endorsement made upon it by the recorder, showing that it was filed with him for record, and the time of such filing.

SAME.—*Recording of Notice in Wrong Record.*—*Evidence.*—*Harmless Error.*—

While the notice of an intention to acquire a mechanic's lien is required to be recorded in the "Miscellaneous Record," and it was erroneous to admit in evidence an entry in what was denominated the "Mechanic's Lien Record" of the county, showing the record of the notice, still it was harmless error, as the controversy being between the immediate parties, and no question as to innocent third parties being involved, the lien was acquired by the filing of the notice and was not affected by the failure of the recorder to record it in the "Miscellaneous Record," or by his mistake in recording it in the "Mechanic's Lien Record," a record not known to the law.

From the Adams Circuit Court.

Adams v. Shaffer et al.

J. F. France, J. T. Merryman and E. A. Hoffman, for appellant.

P. G. Hooper, E. G. Coverdale and J. J. M. La Follette, for appellees.

MCBRIDE, C. J.—The first paragraph of complaint in this case seeks the foreclosure of a mechanic's lien. Its sufficiency was challenged by demurrer, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled by the circuit court, and the appellant asks us to review that ruling. He insists that the paragraph is bad for two reasons.

First. He argues that the notice upon which it is based is insufficient. It is conceded that the notice is in substantial compliance with section 3 of the act of March 6, 1883, section 1690, Elliott's Supplement. The appellant insists, however, that because it appears from its terms that the material was furnished to a contractor, and not to the owner of the land, it should contain a further recital showing that notice had also been given to the owner in accordance with section 5 of the same act (section 1692, Elliott's Supplement).

In this the appellant errs. It was necessary to aver in the complaint and to prove on the trial the giving of such notice. It was not necessary that the notice filed should contain such recital. The averments in the complaint upon this point are full and explicit, showing the giving of the notice. This is sufficient. *Adams v. Buhler*, 131 Ind. 66.

The further ground upon which it is urged that this paragraph is defective is, that it "does not in any way connect the appellant with the erection of the building in question, and for which the labor and material were furnished, by any contract whatever, either express or implied," etc.

The position of the appellant is apparently this: That the labor and material for which the lien is claimed having been furnished to the contractor, and not to the owner of the land,

Adams v. Shaffer *et al.*

the complaint, to be sufficient to withstand demurrer, should show by express averment that the contractor was erecting it under contract with the owner.

Without conceding, or expressing any opinion as to the soundness of the position assumed by the appellant, it is sufficient to say that, fairly construing all of the averments of the complaint together, we think it is shown that the building was erected under contract with the owner, the appellant. In our opinion the circuit court did not err in its ruling on the demurrer.

On the trial the court permitted the appellee, over the objection of the appellant, to read in evidence the original notice, together with the endorsement on it, showing its filing with the recorder for record, and also an entry in what was denominated the "Mechanic's Lien Record" of the county, showing the record of the notice. The original notice was competent evidence, and the court did not err in admitting it. The endorsement upon it, made by the recorder, showing that it was filed with him for record, and the time of such filing, was also competent evidence to prove the fact of filing, and the time.

The statute requires a party wishing to acquire a mechanic's lien to file in the recorder's office a notice of his intention to hold such lien. Section 1690, Elliott's Supplement. Section 1691 requires the recorder to record the notice in the "*Miscellaneous Record*." The law knows no such record as a "Mechanic's Lien Record."

The court erred in admitting in evidence an entry from a record thus designated. The lien, however, is acquired by filing the notice, and not by its record. *Wilson v. Hopkins*, 51 Ind. 231; *Adams v. Buhler*, *supra*.

The controversy here is between the immediate parties, and involves no question as to innocent third parties. As between the parties to this controversy, the lien was not only acquired by the filing of the notice, but it was not affected by the failure of the recorder to record it in the *Miscellaneous*

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Record, or by his mistake in recording it in a record not known to the law. *Wilson v. Logue*, 131 Ind. 191.

The original notice, with its endorsement, showing it in fact properly and duly filed, being competent evidence, and properly admitted, the admission of the entry from the so-called "Mechanic's Lien Record," while erroneous, was harmless.

The only remaining question relates to the sufficiency of the evidence to sustain the finding.

The evidence is conflicting. We could only sustain the appellant in his controversy upon this point by weighing the evidence. This we can not do.

Judgment affirmed, with costs.

Filed Oct. 4, 1892.

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No. 15,304.

MATCHETT v. THE CINCINNATI, WABASH AND MICHIGAN RAILWAY COMPANY.

RAILROAD.—Injury to Brakeman.—Defective Brake.—Contributory Negligence.

—General Verdict.—Answers to Interrogatories.—A brakeman instituted an action against a railroad company to recover damages for injuries alleged to have been occasioned by a defective brake. The complaint alleged that the defect was unknown to the plaintiff, but that it was known to the defendant. The defendant claimed that under the rules of the company it was plaintiff's duty to inspect the brake; that the railroad company had no knowledge of the defect, nor means of knowledge, and that the plaintiff both had the means of knowledge, and was bound to know of the defective brake. A general verdict was returned for the plaintiff. The jury also returned answers to a number of interrogatories submitted to them.

Held, that the general verdict in favor of the plaintiff was in effect a finding that there was negligence on the part of defendant, and that the defect in the brake was not a risk assumed by the plaintiff as an incident to his employment, and that plaintiff had no knowledge of the defective brake.

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Held, also, that the general verdict on these questions was conclusive, as the answers to interrogatories were not utterly irreconcilable therewith.

SAME.—*Conflicting Answers to Interrogatories.*—*Effect of.*—Where the answer to one of the interrogatories stated that the defect in the brake could have been readily discovered by the plaintiff, and the answer to another interrogatory stated that it was not shown whether the defect could have been discovered had an examination been made, the answers neutralized each other, leaving the general verdict decisive that the plaintiff was free from contributory negligence.

VERDICT.—*Contradictory Answers to Interrogatories.*—*What General Verdict Finds.*—Answers to interrogatories can not control the general verdict if they are contradictory, although the verdict may be in irreconcilable conflict with some of the answers. If, however, the answers state fully and without material contradiction a fact which clearly defeats a recovery, the judgment must necessarily be against a plaintiff who is compelled to establish such a fact as an essential element of his cause of action. The general verdict finds all facts in favor of the party for whom it is given unless the answers affirmatively show that such facts do not exist or were not proved. Intendment will not be made in favor of the special answers.

PRACTICE.—*Argumentative Denial.*—*Overruling Demurrers to.*—Where a general denial is filed, and a second paragraph of answer is also filed, which is merely an argumentative denial, it is not error to overrule a demurrer to the second paragraph.

SAME.—*Judgment Upon Answers to Interrogatories.*—*Appellate Court not Bound to Direct.*—An appellate tribunal is not bound to direct judgment upon answers to interrogatories, but may, when justice requires, remand, with instructions to award a *venire de novo*, or grant a new trial.

From the Grant Circuit Court.

H. Brownlee, W. H. Carroll, G. D. Dean, A. E. Steeie and J. A. Kersey, for appellant.

C. E. Cowgill, C. E. Cowgill, Jr., H. B. Shively and H. C. Pettit, for appellee.

ELLIOTT, J.—The substance of the appellant's complaint is this: He entered the service of the appellee as a brakeman, and his duties required him to set the brakes upon the trains on which he was required to work. On the 13th day of December, 1887, he was working on a freight train composed of many cars. He was signaled to set the brake. He undertook to discharge this duty in obedience to the signal,

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at the time believing that the brake and appliances were "in order and not out of repair." The brake was defective and out of repair "in this, the ratchet upon the same, used to hold the brake when tightened, was loose and would not hold." It was necessary in setting the brake for the brakeman to place his foot against the ratchet so that it would catch the cogs, and hold the brake in place after the foot was removed. The brake was permitted to become unsafe and out of repair by the carelessness and negligence of the defendant. The defect in the brake was known to the defendant, but was not known to the plaintiff. The brake was properly set by the plaintiff, and relying upon the belief "that it was in proper condition he removed his foot from the ratchet and so soon as his foot was removed the brake-wheel revolved with great rapidity and force" and threw the plaintiff from the moving train causing him serious injury. To this complaint the appellee answered in two paragraphs. The first paragraph is the general denial, the second contains these material allegations: That the plaintiff entered the service of the defendant under a contract wherein he agreed to be bound by the rules of the company; that one of the rules made it the duty of the plaintiff to inspect the brake and its appliances, and other rules made it his duty to inspect the machinery of the train, and if found to be defective or out of repair to refrain from using it; that the defendant had no knowledge of the fact that the brake was out of repair prior to the happening of the accident; that the plaintiff did have the opportunity and means of knowing the condition of the brake, and it was his especial duty to have such knowledge. There are other allegations in the answer of the same general character as those we have outlined, but we deem it unnecessary to summarize them.

We regard the answer as a mere argumentative denial, and thus regarded there was no error in overruling the demurrer. It certainly denies the material allegation of the

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complaint that the plaintiff did not know the condition of the brake, as well as other important allegations.

The general verdict was in favor of the appellant, but the trial court rendered judgment upon the answers of the jury to the special interrogatories addressed to them, so that the principal questions arise upon the facts exhibited in the answers of the jury. In answer to the second interrogatory it is stated that the plaintiff received a copy of the defendant's rules, and agreed to observe them. In the answer to the third and fourth interrogatories the jury gave the plaintiff's age at the time of entering the defendant's service, putting it at thirty-two years, and they declare that he was a man of ordinary capacity in full possession of his faculties. The answer to the fifth interrogatory shows that the brake was out of order because the "pawl was loose." The answer to the sixth interrogatory is that "the brake fixtures were of a pattern in general use by first-class railroad companies, and when in repair was a good and sufficient brake." The car to which the brake was attached is shown by the answer to the sixth interrogatory to have been made part of the train on the day of the accident. The answers to the eighth and ninth interrogatories show how many cars were in the train at Elkhart and Urbana. By the answers to the ninth and tenth interrogatories the car is shown to have come under the charge of the plaintiff at Elkhart, and to have been upon other roads until it came into his charge for thirty days. The jury were asked by the eleventh interrogatory if the defect in the brake, if there was any, could not have been readily observed by the plaintiff, and they answered, "Was not shown." In answer to the twelfth interrogatory the jury declared that it was the plaintiff's duty, according to the company's book of rules, to examine the brake and ascertain if it was in repair and fit for use. The number of stations the train stopped at was asked for in the thirteenth interrogatory, but the jury answered that this was not shown.

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The answer to the fourteenth interrogatory asserts that the plaintiff did not make any examination of the brake or appliances when it was taken into the train at Elkhart.

The fifteenth interrogatory asked the jury to find how long it was after the plaintiff and his train crew took charge of the train at Elkhart until the train left that place, and the jury answered that it was not shown. In answer to the sixteenth, twentieth and twenty-third interrogatories, the jury stated that the train stopped at Goshen about thirty minutes, at Warsaw about the same length of time, and at North Manchester about thirty-five minutes. The answer to the twenty-fifth interrogatory shows that the plaintiff did not examine the brakes at any of the stopping places, and the answer to the twenty-sixth interrogatory is substantially to the same effect. The answer to the twenty-eighth is to the effect that if the plaintiff had made the examination required of him, the defect could have been readily discovered. The answer to the twenty-ninth interrogatory is, in effect, the same as the answer to the twelfth, and the answers to the thirtieth and thirty-first declare that no report was ever made by the plaintiff of the condition of the brake until after the accident.

The jury, in answer to the thirty-second interrogatory, say that it "is not stated" whether the plaintiff had as much knowledge of the condition of the brake as the defendant. In the thirty-third interrogatory the jury were asked what means the defendant had of knowing that the brake was out of repair, and they answered, "Not given." The answer to the thirty-fourth interrogatory is that the defendant had no actual knowledge of the brake being out of repair, and the answer to the thirty-fifth interrogatory is to the same effect.

It is necessary to consider some questions of practice presented by the appellant's counsel before entering upon a discussion of the principal questions in the case, inasmuch as those questions of practice relate to the construction of the answers to the interrogatories and their influence as against

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the general verdict. It is undoubtedly true, as appellant's counsel assert, that if there is no irreconcilable conflict between the general verdict and the special answers, the former must prevail, and it is likewise true that intendment will not be made in favor of the special answers. It is also true that the answers to the interrogatories can not control the general verdict if they are contradictory, although the verdict may be in irreconcilable conflict with some of these answers. See authorities cited in Elliott's Appellate Procedure, section 752. It is, however, to be kept in mind that if the answers to the interrogatories state fully and without material contradiction a fact which clearly defeats a recovery, the judgment must necessarily be against a plaintiff who is compelled to establish such a fact as an essential element of his cause of action. *Korrady v. Lake Shore, etc., R. W. Co.*, 131 Ind. 261. See authorities cited in Elliott's Appellate Procedure, section 753, note 1.

It is proper to say in this connection that the appellee's counsel are in error in assuming that the absence from the special answers of facts essential to a recovery justifies the conclusion that the plaintiff failed to prove such facts. This view is founded on a radical error, for the rule is that the general verdict finds all facts in favor of the party for whom it is given, unless the answers affirmatively show that such facts do not exist or were not proved. *Town of Poseyville v. Lewis*, 126 Ind. 80; *Rogers v. Leyden*, 127 Ind. 50 (59). If the facts stated in the answers of the jury show that the fault of the plaintiff proximately contributed to his injury, then there can be no recovery, and the ruling of the trial court was right even if it be conceded that the defendant was guilty of negligence in not providing the plaintiff with a safe working place and appliances. To the question of the appellant's contributory fault we first address our discussion.

It is settled law that it is an employer's duty to make reasonable rules for the conduct of business, and it is equally settled that an employee who contracts to obey those rules

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and perform service under them is in fault if he does not do what they require. *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, and authorities cited. In this instance the employee contracted with express reference to the rules of the company, so that there can be no question as to their operation upon him. If he disobeyed the rules, and his disobedience proximately contributed to the injury, he has no cause of action. The only question, therefore, which fairly admits of debate is as to whether the fault of the appellant in failing to examine the brake, as it was his duty to do, proximately contributed to his injury. The nature of the cause of the accident is, probably, such as would lead, in the absence of a general verdict, to the inference that the defect could have been discovered upon inspection, but this inference we can not make as against the general verdict, since we can make no intendments in support of the answers to the interrogatories. The answer to the twenty-eighth interrogatory, although there is a modifying clause, may be fairly construed as declaring that the defect in the brake could have been readily discovered, and if this answer could be regarded as standing uncontradicted, there would be no great difficulty in holding that the plaintiff's fault in failing to make an inspection contributed to his injury, for we think it clear that where an employee agrees, as part of his duty, to make an inspection of an appliance placed in his especial charge, and there is a defect that an ordinarily careful inspection would have revealed, his fault in failing to make the inspection may be deemed the proximate cause of an injury resulting from the defect. Where, however, the defect is not such as an ordinary inspection would have revealed, it can not be assumed, as against a general verdict, that the fault proximately contributed to the injury. This we say (to make explicit what is always implied) with reference to the case before us, and as applicable to the duties of a brakeman. To that class of employees we limit our statement, for we do not intend to hold that there may not be a class of employees

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whose failure to inspect will defeat a recovery, although the defect may be one not open to view or discoverable upon an ordinary inspection.

It is evident that a brakeman receiving a car into a train out on the road can not be held to the same degree of care as a regular inspector or a man in a shop properly supplied with tools. But the twenty-eighth answer does not stand alone, so that we can not fully apply the rules we have stated. The answer to the eleventh interrogatory, as we have seen, declares that whether the defect could have been discovered had an examination been made "was not shown." If it was not shown, then, it was, so far as this case is concerned, as if no discovery could have been made, for as the general verdict was for the plaintiff, all material facts not stated in the answers must be deemed to have been found in his favor. We can not escape the conclusion that the one answer nullifies the other, and leaves the general verdict effective upon the point covered by the interrogatories. As the plaintiff has the general verdict in his favor, and as the answers are antagonistic, we can not say from the mere fact that the plaintiff did not make an inspection, that there was such contributory negligence as bars a recovery. The case is not that of a special verdict, but of answers to interrogatories relied upon to defeat a general verdict, and we can not assume, or infer, as against the general verdict, that the fault of the plaintiff proximately contributed to his injury.

It has been held many times that it is not sufficient that there be some fault or negligence on the part of the plaintiff, for there may be fault that does not contribute to the injury. *Nave v. Flack*, 90 Ind. 205 (211); *Louisville, etc., R. W. Co. v. Richardson*, 66 Ind. 43, 48 (32 Am. R. 94). Judge Cooley's statement of the rule is this: "The negligence that will defeat a recovery must be such as proximately contributed to the injury." Cooley Torts, 679. In the case of *Pennsylvania Company v. Whitcomb*, *supra*, many authorities were cited to the effect that the failure

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to obey a rule does not necessarily authorize the inference that the fault of an employee in disobeying proximately contributed to the injury received by him.

The next question requiring consideration is whether the plaintiff assumed the risk of the breaking of the pawl, or ratchet, as an incident of the service into which he voluntarily entered. Here, again, we encounter the general verdict with its wide effect, and are required to decide the question stated upon the facts contained in the answers of the jury under the rule that the verdict finds material facts in favor of the plaintiff except so far as the answers state facts antagonistic to the verdict. The question does not come to us, it is proper to say, as the question came in the case of the *Chicago, etc., R. R. Co. v. Fry*, 131 Ind. 318. We can find no specific fact which authorizes us, as against the general verdict, to adjudge that the appellant assumed the danger of the breaking of the pawl or ratchet as one of the perils of his employment. If there were no general verdict we might, perhaps, adjudge that the peril was incident to the service, but the general verdict stands in the way, and we can not so adjudge, since we can not say that the defect was not one against which it was the employer's duty to provide. We fully recognize the rule that there are perils incident to the service a brakeman enters which he assumes, and we fully approve the doctrine of such cases as *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18; *Jenney, etc., Co. v. Murphy*, 115 Ind. 566; *Umbach v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191; *Lake Shore, etc., R. W. Co. v. McCormick*, 74 Ind. 440; *Brazil, etc., Co. v. Hoodlet*, 129 Ind. 327; *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20. But, while we fully recognize the rule stated, we can not be unmindful of the established rule that the employer must use reasonable care to provide his employees with a safe working place and appliances. *Ohio, etc., R. W. Co. v. Pearcy*, 128 Ind. 197; *Rogers v. Leyden*, 127 Ind. 50; *Louisville, etc., R. W. Co. v. Corps*, 124 Ind. 427; *Taylor v. Evansville*,

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etc., *R. R. Co.*, 121 Ind. 124; *Cincinnati, etc.*, *R. W. Co. v. Lang*, 118 Ind. 579, and authorities cited. Nor can we be unmindful of the rule that the employee's duty requires him to exercise reasonable care to keep appliances in repair as well as to furnish safe ones in the beginning. *Indiana Car Co. v. Parker*, 100 Ind. 181. We know, also, that upon the employer rests the duty of making a reasonable inspection. *Ohio, etc.*, *R. R. Co. v. Percy*, *supra*; *Cincinnati, etc.*, *R. R. Co. v. McMullen*, 117 Ind. 439; *Northern Pacific, etc.*, *R. R. Co. v. Herbert*, 116 U. S. 642. It is true there is said to be a difference between the duty of a railroad company to inspect cars received from other companies and the duty to inspect its own cars and appliances. *Cincinnati, etc.*, *R. R. Co. v. McMullen*, *supra*. But, granting that there is such a difference, it would not affect this case, inasmuch as the car on which the appellant was injured was owned by the appellee. At all events we can not hold, as against the general verdict, that the facts stated in the answer are such as require the conclusion that the appellant assumed dangers arising from the employee's breach of duty. That there was such a breach of duty the general verdict asserts, and there are no facts stated that are utterly irreconcilable with that assertion.

The appellee's counsel tacitly assume that the special answers show that the employee had knowledge of the defect, but this, as we have elsewhere indicated, is an undue assumption. The general verdict necessarily finds that the appellant had no knowledge of the defect, since this is directly and explicitly alleged in the complaint. This allegation was an essential one. It has often been decided that an employee who sues the employer must aver that he did not know of the defect in the appliances furnished him which caused his injury. *Louisville, etc.*, *R. R. Co. v. Corps*, *supra*; *Louisville, etc.*, *R. W. Co. v. Sandford*, 117 Ind. 265; *Brazil, etc.*, *Co. v. Young*, 117 Ind. 520; *Lake Shore, etc.*, *R. W. Co. v. Stupak*, 108 Ind. 1; *Indiana, etc.*, *R. W. Co. v.*

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Dailey, 110 Ind. 75; *Philadelphia, etc., R. R. Co. v. Hughes*, 119 Pa. St. 301; *Wilson v. Winona, etc., R. R. Co.*, 37 Minn. 326; *Gaffney v. New York, etc., R. R. Co.*, 15 R. I. 456.

It is probably true that where the means and opportunities of knowledge are equally open to employer and employee they stand on common ground, and that the employee can not, in such a case, maintain an action against his employer. *Brazil, etc., Co. v. Hoodlet, supra* (p. 333); *Griffin v. Ohio, etc., R. W. Co.*, 124 Ind. 326; *Ballou v. Chicago, etc., R. W. Co.*, 54 Wis. 257 (5 Am. & Eng. R. W. Cases, 460). But we are compelled to say here, as we have so often said in reference to other points, that the general verdict forbids us from assuming that the appellant and the appellee stood on common ground. There are no facts not reconcilable with the general verdict authorizing us to adjudge that the means and opportunities of knowledge were equal. We can not conclude from the nature of the defect in the brake that it was not a latent one which only a minute inspection would reveal. For anything that appears, the opportunities for knowledge on the part of the employer were far superior to those of a brakeman engaged at work upon a train, moving over the road. We can not say precisely what he was doing, or was bound to do, either while the train was in motion or was stopping at the various stations, although we do know, as matter of common knowledge, that a brakeman on a train out upon the road necessarily has other duties to perform than those of inspection.

The general verdict necessarily decides that the appellee was negligent and that the appellant was not guilty of contributory negligence. We can not, as appellee's counsel ask us to do, adjudge that the facts stated in the answers so clearly show negligence as to require us to declare that they are so invincibly hostile to the general verdict as to demand its overthrow. *Fort Wayne, etc., R. R. Co. v. Beyerle*, 110 Ind. 100, and cases cited.

Our judgment is that the trial court erred in awarding

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judgment on the answers to the special interrogatories. We are clearly of the opinion that justice requires a new trial, since it is evident that some material interrogatories are evasively answered, and responses to others inadequate and unsatisfactory. It is well settled that the appellate tribunal is not bound to direct judgment upon answers to interrogatories, but may, when justice requires, remand with instructions to award a *venire de novo* or to grant a new trial. *Stuart v. Patrick*, 5 Ind. App. 50; *McAfee v. Reynolds*, 180 Ind. 33. See authorities cited in Elliott App. Proc., section 563, note 2.

Judgment reversed, with instructions to the trial court to award a new trial.

Filed Sept. 14, 1892.

No. 15,794.

EWING ET AL. v. BRATTON ET AL.

132 345
151 18

MORTGAGE.—Foreclosure of.—Judgment Creditors.—Redemption by.—Sheriff's Sale by Mortgagee.—The plaintiff's assignors held two judgments against one W., which were liens on land of W., on which the defendant held a mortgage. She obtained a judgment and foreclosure of her mortgage. The land was sold and she became the purchaser. In a suit to recover by plaintiff's assignors it was held that as against one of their assignments only part of defendants' judgment had a prior lien and they were permitted to redeem for a much less amount than the full amount of her judgment.

Held, that as against the plaintiffs defendant might thereafter have foreclosure for the unsatisfied part of her judgment subject to plaintiffs' first judgment and the amount paid to redeem from defendant.

From the Huntington Circuit Court.

W. H. Trammel and *T. Roche*, for appellants.

M. L. Spencer and *W. A. Branyan*, for appellee.

OLDS, J.—The appellants allege in their complaint that

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on March 27th, 1878, Jerome I. Case obtained judgment against one Charles Wolverton in the Huntington Circuit Court for the sum of \$254.27, and also on March 18th, 1879, recovered another judgment against the same parties for \$263.20; that said judgments had been assigned to the J. I. Case Threshing Machine Company, and the court had found said last named company to be the owner of the same, and said judgments were liens upon the land described in the complaint.

That on December 31st, 1878, Appellee Nix obtained a judgment and foreclosure of mortgage on the same real estate in the same court against said Charles Wolverton and Jemima Wolverton, his wife, for the sum of \$2,843.85, which mortgage antedates the aforesaid judgment, and on the 8th day of June, 1885, said appellee had said land sold on a decree in his foreclosure case for the sum of \$3,793.75 to Charles Nix, who paid by a receipt for the said sum executed by him as the agent and attorney of said Elizabeth Nix delivered to the sheriff, and the sheriff issued to him a certificate of purchase; that said Case Threshing Machine Company, as the owner of said two judgments against Wolverton on the 4th day of June, 1886, brought suit against the appellee Elizabeth L. Nix to have said judgment and foreclosure of the said appellee Elizabeth L. Nix against said Charles Wolverton on said land corrected, and the proper and true amount due thereon ascertained, and that it be allowed to redeem said land from said sale. Such proceedings were had in said cause that it was found that said Case Machine Company, by virtue of said judgments aforesaid, had the right to redeem said real estate from said mortgage by paying to said Elizabeth L. Nix the amount of the principal, interest and attorney's fees due thereon, to wit, \$2,733.33, and that said company be substituted for and entitled to all the rights and equities held, owned or possessed by the said Elizabeth L. Nix by vir-

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tue of her said mortgage; that in pursuance of this adjudication the said Case Company within the time allowed, on December 10th, 1887, paid to the clerk of said court said sum of \$2,733.33 with accrued interest thereon, making the sum of \$2,736.98. On the same day said Case Company, for and in consideration of \$3,605.14, being the amount paid by it to redeem, and the amount of its judgments, which were a lien on said land, transferred and assigned to these appellants all its interest in and to the same, and after this, on the 16th day of December, 1887, the appellee applied to and received of the clerk of said court said sum of \$2,736.98, paid by said Case Company for the redemption of said real estate. Afterwards, in December, 1887, the said appellee caused another order of sale to be issued on said decree and to be placed in the hands of the sheriff of said Huntington county, who has levied the same upon the land and advertised it for sale and is threatening to sell said real estate on said writ. The Wolvertons were not parties to suit of the Case Threshing Machine Company to redeem. Upon these alleged facts appellants ask a temporary restraining order until the final hearing and then for a perpetual injunction against the sale.

Appellee answered, and a demurrer was addressed to the answer, and the court carried it back and sustained it to the complaint, and it is this ruling that is complained of and assigned as error, and presents the question as to the sufficiency to the complaint.

It appears from the complaint that the judgment owned by the Case Company rendered in March, 1878, is prior to the judgment of foreclosure, the mortgage being of prior date to such judgment. Appellee Nix recovered her judgment and foreclosure against the Wolvertons. The Case Company, as junior lienholders, and not having been made parties to the foreclosure proceedings, brought suit asking to have a less amount than the face of the judg-

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ment and interest fixed as the amount which it should pay in discharge of the lien existing by virtue of the mortgage and prior to their judgment in redemption from the sale, and succeeded in having a much less amount fixed as the amount which they should pay in redemption in discharge of the mortgage lien in so far as they were bound by it, but in this proceeding the judgment and mortgage debtor Wolverton was not a party, so that in so far as the judgment and foreclosure is concerned, as between the appellee herein and Wolverton, the judgment and decree is not affected by the suit of the Case Company. That suit settled only the question as to the amount which the Case Company was compelled to pay to redeem. In other words, it fixed the amount of the debt due the appellee that was junior to the judgment of the appellant. The judgment of Mrs. Nix as against Wolverton remained the same, but by the decree of the court as against the judgment creditor, the J. I. Case Threshing Machine Company, she could only have priority as to \$2,733.33.

It is a well settled general rule that a judgment creditor can not redeem from his own sale, that the lien of the judgment upon which a sale is had on the land sold is exhausted by the first sale and does not reattach upon redemption by a junior judgment creditor, but only on redemption by the owner or part owner, his executors or administrators, under the order of the court, or his heirs or devisees or persons claiming a legal or equitable title under him or them. *Hervey v. Krost*, 116 Ind. 268; *Green v. Stobo*, 118 Ind. 332.

It remains then to be determined what attitude the appellee occupies under the facts alleged in this case. She obtained her judgment against Wolverton for \$2,843.81, and for foreclosure of her mortgage. As against him this is a valid judgment.

After the lapse of some years and the accumulation of several hundred dollars in interest she has an order of

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sale issued and makes a sale of the land. The appellants' assignors, who are judgment creditors and were not parties to the original judgment, bring suit and have a decree fixing the amount necessary for them to pay to redeem from such sale, and the court holds and enters a decree that as against such junior judgment creditors she only has a prior lien to the amount of \$2,733.33, reducing the judgment as against the appellants' assignors several hundred dollars, and they redeem from the sale. While it is true there is but one judgment against Wolverton, yet as modified by the subsequent decree of the court as between the appellants' assignors, the Case Company and the appellee, it is in effect two judgments, one having priority as against the company, and the other being junior to one of the judgments of the company. One portion of her judgment is enforceable by sale on the decree as against the Case Company, and from which they must redeem to derive any benefit from the land in payment of their first judgment; the other part of her judgment is prior to their second judgment.

To protect the junior portion of her judgment Mrs. Nix must pay off or redeem from any sale made on the Case Company's judgment, rendered March, 1878. She made a sale and bid an amount sufficient to satisfy the whole amount due her. She was prevented from having the benefit of the full amount of such sale by such junior judgment creditors bringing suit and compelling her to accept a less amount in redemption of the property. To hold that the unsatisfied portion of her judgment was not a lien upon the land junior to the amount paid in redemption and the appellants' judgment, and that she has no right to sell subject to such prior liens, would deprive her of substantial rights and would be inequitable. It would be depriving her of all right to make her money out of the land though it may be worth much more than all the liens. If she can not enforce her lien against the land

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now she never could have done so, since the same state of facts have existed ever since the decree in the action to redeem. She has, according to the judgment of the court, a valid claim against Wolverton for the full amount of her original judgment. The judgment creditors delay action until a sale is made, and she on the faith of the judgment has bid the land off for the full amount; afterwards they come into court and have a decree which permits them to redeem for a less amount.

We think the appellee's judgment must be treated the same as if it were two separate judgments, one a decree of foreclosure having priority to Case Company's judgment of March, 1878, and the other a judgment junior to the lien of such judgment and prior to the Case Company judgment rendered in March, 1879, and that as the owner of the junior judgment appellee has a right to sell the land subject to the amount paid in redemption, and the prior judgment in favor of the Case Company rendered in March, 1878, with interest; that she stands in the same attitude as if she had one decree of foreclosure and one judgment, and she had sold on her decree and still retained her judgment unsatisfied, and upon which no sale had been had. After the redemption from her sale on the decree she, as owner of the junior judgment, would have the same rights as would any other person. Besides, the appellants are not in a position to complain. They are not harmed by a sale on the remainder of appellee's judgment. It is junior to one of their liens, and to derive any benefit from the property she will be compelled to pay the appellants' prior judgment and their rights are thereby preserved, and that is all they have a right to ask. The judgment defendant, the mortgagor of the land, is making no question as to the right of the appellee to sell to satisfy the remainder of her judgment.

The appellants were not entitled to an injunction enjoining the appellee from selling.

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There was no error in sustaining the demurrer to the complaint.

Judgment affirmed with costs.

Filed April 27, 1892; petition for a rehearing overruled Oct. 5, 1892.

No. 14,652.

CHANDLER ET AL. v. JESSUP.

132	351
154	169
154	171

PARTNERSHIP.—*Real Estate Purchased With Firm Assets.—Title Not Taken in Firm Name.—Liability of for Debts of Individual Partners.*—Where payments were made out of firm property and funds upon the purchase or improvement of real estate not purchased or used for partnership purposes and title taken in the name of the individual partners or of others on their account, the sums so paid were, by the act of payment, withdrawn from the firm assets and the land so purchased is liable for the individual debts of a partner to the extent of his interest as between himself and a creditor.

EXEMPTION.—*Fraudulent Conveyance.—When Exemption Not Allowed.*—When a conveyance is found to be fraudulent a motion to modify the judgment so as to allow defendant an exemption of \$300 out of the proceeds of the sale of the land was properly overruled, no issue upon the subject having been tendered or joined by the parties, and no evidence having been introduced upon the subject at the trial and there being no proof that the party claiming the exemption was a resident householder.

From the Howard Circuit Court.

J. C. Blacklidge, W. E. Blacklidge and B. C. Moon, for appellants.

M. Bell and W. C. Purdum, for appellee.

MILLER, J.—This action was brought by the appellee to recover a sum of money paid out for the use and benefit of the appellant John Chandler, and to set aside a conveyance of real estate to the appellant Elizabeth Chandler, and to subject the real estate to the payment of the debt.

Chandler et al. v. Jessup.

The complaint is in the usual form in such cases, averring, among other things, that on the 27th day of October, 1883, the defendant John Chandler, and Josiah Beeson purchased and paid for, with their own means and property, the real estate in the complaint described; and afterward caused to be erected and constructed upon the lot, permanent and valuable improvement of the value of two thousand dollars, and paid therefor with their own means; each paying one-half of the purchase money and cost of improvements.

That at the time of the purchase of the lot and making of the improvements the defendant John Chandler was and is insolvent.

That for the fraudulent purpose of cheating, hindering and delaying his creditors he caused the deed for the one-half of said lot to be taken in the name of his wife, Elizabeth Chandler, and for a like fraudulent purpose and design caused the improvements to be made upon the lot at his own expense. That said Elizabeth Chandler paid no part of the consideration for the lot, and no part of the consideration for the lot, and no part of the cost of the improvements made thereon, but accepted said conveyance and suffered the improvements to be made with a full knowledge of all the facts and of the fraudulent intent of her husband.

The defendants answered the complaint by a general denial.

A trial by the court resulted in a finding and judgment for the plaintiff against the defendant John Chandler for a sum of money, and against both defendants setting aside the conveyance of the real estate and subjecting the same to the payment of the judgment.

The defendants separately moved the court for a new trial, but their motions were overruled and judgment rendered on the finding.

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After final judgment the defendant John Chandler filed his motion as follows :

"John Chandler moves the court to modify the judgment of the court heretofore pronounced and entered in the order book in this cause in the following respect, to wit:

"To insert a provision in said judgment that upon a sale of the undivided half of lot nine mentioned in said judgment in pursuance thereto, this defendant John Chandler be permitted to claim and hold as exempt from execution three hundred dollars' worth of property as appraised by appraisers, and that the judgment of the court in this cause shall not prejudice the right of John Chandler to claim said exemption of three hundred dollars from the proceeds of a sale of said half of lot nine mentioned in the judgment."

This motion was overruled and excepted to by the defendant John Chandler.

The errors assigned call in question the overruling of the motion for a new trial, and to modify the judgment.

The only questions discussed by counsel relate to the sufficiency of the evidence to sustain the judgment, and the refusal of the court to modify the judgment.

Counsel in their brief state that there was some evidence to establish the insolvency of John Chandler at the time the deed was made and improvements placed upon the lot, and that he had the property conveyed to his wife to prevent its sale upon execution. The fact that there was such evidence renders it unnecessary to consider the evidence given by the defendants tending to show that this property was conveyed to Mrs. Chandler to repay her for an indebtedness due her from her husband on account of previous transactions between them. We must presume that the court fully considered this with the other evidence and rendered a finding and judg-

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ment upon the weight of the evidence as it was disclosed to him upon the trial.

The evidence shows that John Chandler and Josiah Beeson were partners, and that the property and its improvements were paid for out of the store belonging to the firm, with the exception of some lumber from a saw mill formerly owned by Chandler. The appellants claim that inasmuch as the appellee was the individual creditor of Chandler, and the firm property was not subject to the individual debts of the partners until the partnership debts were paid and accounts adjusted, the appellee was not injured by the conveyance to Mrs. Chandler, especially as the firm of Chandler and Beeson was insolvent.

When payments were made out of the firm property and funds, upon the purchase or improvement of real estate, not purchased or used for partnership purposes, and title taken in the names of the individual partners, or of others on their account, the sums so paid were, by the act of payment, withdrawn from the firm assets and as between them and the firm became the individual property of the partners or the grantee.

What the rights of the firm creditors would have been if they had been parties to the suit, we are not called upon to determine.

In our opinion the court did not err in overruling the motion of the appellant John Chandler to modify the judgment so as to give him \$300 out of the proceeds of the sale of the half lot.

No issue upon this subject had been tendered or joined by the parties. No evidence had been introduced upon the subject at the trial and we fail to find proof of the necessary fact that Chandler was a resident householder, except such as arises as a mere inference from other facts proven.

The court having found that the conveyance was fraudulent the appellant John Chandler could not claim the

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property so fraudulently conveyed, or any part of it, as an exemption. *Mandlove v. Burton*, 1 Ind. 39; *Holman v. Martin*, 12 Ind. 553; *Jones v. Deport*, 123 Ind. 594.

We find no error in the record.

Judgment affirmed.

Filed Oct. 11, 1892.

No. 15,075.

THISTLEWAITE ET AL. v. THISTLEWAITE ET AL.

EVIDENCE.—*Advancements.*—*Declarations of Decedent.*—*Res Gestæ.*—*Partition.*—In an action for partition where pleadings were filed which presented the question for decision whether some of the heirs of the decedent had not received property from him as an advancement, declarations of the deceased, made several years after the transaction, as to the terms upon which the money and property were turned over to his children were too remote in point of time to be admitted in evidence as part of the *res gestæ*.

SAME.—*Declarations Against Interest of Party Making.*—Such declarations were not admissible in evidence either upon the ground that they were declarations against the interest of the party by whom they were made, inasmuch as so far as the interest of the decedent was concerned it was immaterial whether the transfer of the money and property was by way of gift or advancement.

SAME.—*Exclusion of Period of Remoteness.*—Evidence that the decedent had purchased the land in controversy with money received from his first wife, the mother of the heirs, was properly excluded in view of the remoteness as to time, and its indirection as to the main question.

SAME.—*Conversation with Decedent.*—*Party Testifying Against Herself.*—*Remedy of Other Parties.*—A party to an action being competent to testify against herself, although her testimony embraced conversations with a person since deceased, the other parties to the action can not complain, when they failed to ask, as was their right to do, to have a specific and clear instruction directing the jury that such testimony was not competent against them.

From the Hamilton Circuit Court.

132	355
151	76
132	355
166	35

Thistlewaite et al. v. Thistlewaite et al.

T. J. Kane and T. P. Davis, for appellants.

M. Bristow, A. Boulder, R. R. Stephenson, and W. R. Fertig, for appellees.

ELLIOTT, J.—The complaint in this case seeks the partition of lands of which John Thistlewaite died the owner. Such pleadings were filed as presented for decision the question whether some of the heirs of the deceased had not respectively received property as an advancement, and it was decided that they had so received property. The questions argued by counsel are presented by a motion for a new trial, and these questions we shall consider and decide in the order in which they logically arise.

The appellants made various offers to prove the declarations of John Thistlewaite as to the terms upon which the money and property was turned over to his children, but the court excluded the offered evidence. The evidence offered is of the same general character, and was, in substance, that John Thistlewaite declared that the property was made over to the respective recipients as an absolute gift, and not as an advancement. The offered declarations were made several years after the transactions, and were not, in any sense, part of the acts. They were too remote in point of time to be considered as of the *res gestæ*, and they were, therefore, not competent upon that ground. Nor do we think they are competent upon the ground that they were declarations against the interest of the party by whom they were made, inasmuch as so far as his interest was concerned it was immaterial whether the transfer of the money and property was by way of a gift or advancement. We think the question under consideration must be regarded as settled by the decision in the case of *Harness v. Harness*, 49 Ind. 384.

In the case referred to the earlier cases of *Woolery v. Woolery*, 29 Ind. 249, and *Hamlyn v. Nesbit*, 87 Ind. 284, were expressly overruled in so far as they were opposed

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to the doctrine declared by the court. The case of *Harness v. Harness*, *supra*, was approved in *Joyce v. Hamilton*, 111 Ind. 163 (167), and a distinction adjudged to exist between declarations of the ancestor made before the transaction and declarations subsequently made. We feel bound to yield to these decisions.

The trial court did not commit any material error in refusing to permit the appellants to prove that John Thistlewaite purchased the land which was the basis of the accumulations that enabled him to make the advancements to his children with money received from his first wife, the mother of the appellants. The introduction of such evidence in this instance would, in view of its remoteness as to time and its indirection as to the main question, have led into a collateral investigation not competent under the issues.

The appellees were allowed to examine Harriet Cox, one of the parties to the action, and a daughter of John Thistlewaite. We are inclined to agree with appellants' counsel that she was not a competent witness against any of those to whom money had been paid or property conveyed except herself, but she was undoubtedly competent to testify as against herself, although her testimony embraced conversations with her deceased father. If she elected to testify as against herself, the other parties had no cause of complaint. Their right was to have a specific and clear instruction directing the jury that her testimony was not competent against them. Where evidence is competent against one party and not against others, the proper practice is to ask an instruction limiting the evidence to the parties against whom it is admissible. Had such an instruction been asked and refused it would have been prejudicial error. See authorities cited in Elliott's *Appellate Procedure*, section 774.

We can not agree that the verdict is so clearly unsupported by evidence as to require a reversal. We are, in-

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deed, inclined to the opinion that as the presumption is that the transfers by the ancestor were advancements, any other conclusion than that reached by the jury would have been radically wrong.

Judgment affirmed.

Filed Oct. 7, 1892

No. 15,907.

YORK ET AL. v. ROCKWOOD.

FRAUDULENT CONVEYANCE.—*Volunteer.—Fraudulent Intent of Grantor.—Notice of to Grantee Unnecessary.*—It is not necessary for the purpose of setting aside a fraudulent conveyance to a volunteer, who paid no consideration, to allege and prove notice to the grantee of the fraudulent intent of the grantor.

SAME.—*Complaint.—Averment of Grantor's Insolvency.—Sufficiency of.*—The averment in the complaint that the grantor did not have at the time of the conveyance, nor has he had since, or at the time of the commencement of the action, sufficient property subject to execution to pay his debts, is a sufficient allegation as to his insolvency during that time.

From the White Circuit Court.

R. Gregory, — Beck and W. B. Austin, for appellants.
E. B. Sellers and W. E. Uhl, for appellee.

OLDS, J.—The appellee brought this action against the appellants on an account against Noble J. York, for moneys had and received, and to set aside a conveyance of real estate from Noble J. to Emma M. York, the conveyance being made to the said Emma M. the day before she and her co-appellant were married, and to her by her maiden name of Harding.

Issues were joined by a joint answer of the appellants in three paragraphs:

First. General denial.

132	358
143	677
132	358
144	664
132	358
150	414

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Second. Payment; and,

Third. Accord and satisfaction, and by a reply in denial of the affirmative answers.

There was a trial by the court, resulting in a finding in favor of the appellee for the sum of four hundred and eighty dollars, and that the conveyance was fraudulent and void, and judgment was rendered in accordance with the finding.

Appellants filed a motion for a new trial, which was overruled. There was also a demurrer filed to the complaint and overruled, and exceptions reserved; also, a motion in arrest of judgment was made and overruled, and exceptions reserved.

Errors are assigned on the rulings of the court in overruling the demurrer, motion for a new trial, and in arrest of judgment, and that the complaint does not state facts sufficient to constitute a cause of action.

It is first contended that the complaint is insufficient, for the reason that it does not allege knowledge on the part of the grantee in the deed to appellant Emma M. York, of the fraudulent intent of the grantor, Noble J. York, to defraud his creditors, and that it fails to allege the insolvency of the grantor at the time of the conveyance, and from that time until the commencement of the action. The complaint alleges that there was no consideration for the conveyance. It is the settled law of this State that it is not necessary, for the purpose of setting aside a fraudulent conveyance to a volunteer who paid no consideration, to allege and prove notice to the grantee of the fraudulent intent of the grantor. A fraudulent conveyance, where the grantee paid no consideration, may be set aside, although the grantee had no notice of the fraudulent intent of the grantor. *Barkley v. Tapp*, 87 Ind. 25; *Spaulding v. Blythe*, 73 Ind. 93.

The other alleged defect in the complaint does not exist. The complaint does allege that the grantor did not have at the time of the conveyance, nor has he had since, or at the time of the commencement of the suit, sufficient property subject to execution to pay his debts. These allegations are

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sufficient. *Hogan v. Robinson*, 94 Ind. 138; *Noble v. Hines*, 72 Ind. 12.

The question presented on the motion for a new trial relates to the sufficiency of the evidence to support the finding. It is insisted that the answer of accord and satisfaction is proven by undisputed evidence; also, that the undisputed evidence shows that the grantee paid a valuable consideration for the real estate.

With this theory of counsel we can not agree. There was evidence clearly tending to support the finding of the court. The amount of money originally received by Noble J. York from the appellee was in dispute. From this evidence the court may have very properly found that York received a much larger amount than he admitted having received and sought to account for. There was evidence tending to establish the fact that the grantee, Emma M. York, had no money with which she could have paid the sum claimed. It was for the court trying the cause to determine the weight to be given to the evidence.

There is no error in the record.

Judgment affirmed, with costs.

Filed Oct. 11, 1892.

132	360
133	111
132	360
162	381
132	360
163	659

No. 15,364.

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ET AL.

INSURANCE.—Action on Policy.—Condition Against Other Insurance.—Answer.—Pleading Additional Insurance.—Sufficiency of.—In an action to recover on a policy of fire insurance containing a condition avoiding it if the insured should obtain other insurance without the consent of the company, when a copy of the policy is filed with the complaint, a special answer in confession and avoidance averring a violation of such condition is not demurrable because a copy of the policy is not filed

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with the answer. It was not necessary either to allege in such answer that the additional insurance was in force when the loss occurred. If the policy in suit was avoided by the additional insurance, it was avoided when the additional policy was taken, and it is immaterial whether the new policy was still in force when the loss occurred or not.

SAME.—Reply Averring Additional Insurance to be Invalid.—To an answer pleading a violation of the stipulation against other insurance, a reply was had which averred that the second policy contained a provision on that subject similar to the one in the policy sued on; that when it was issued, the policy sued on was in full force; that the assured did not notify the second insurer of the existence of the first policy, and that that company never at any time, nor in any manner, consented to the additional insurance.

SAME.—Charter Prohibition Against Insuring Property Already Insured.—The fact that the charter of the second company contained a provision prohibiting it from insuring property already insured, and declaring policies issued in violation thereof void, did not render the first policy effective. The presumption is that the party procuring the second policy did so with the intention of availing himself of the protection which it *prima facie* afforded him.

SAME.—Waiver of Broken Condition.—What Constitutes.—Proof of Loss, etc.—A forfeiture of an insurance policy, by reason of a violation of one of its conditions by the assured, is waived by the company when in the full knowledge of the facts it not only required the assured to make proofs of his loss, but after he had made proofs required him to make additional proofs, and to furnish plans and specifications of the buildings destroyed, and to expend money in travelling and other expenses.

SAME.—Reply.—Pleading Waiver.—Sustaining Demurrer To.—When not Harmless Error.—It was not harmless error to sustain a demurrer to a reply setting up such a waiver of the forfeiture by the company, since neither under the general denial contained in the reply nor under the allegation in the complaint that the insured had furnished the proofs of loss was evidence admissible as to the making of the additional proofs of loss, and of the furnishing of plans and specifications of the building destroyed, and of the traveling and other expenses.

SAME.—Adoption of Theory by Court.—Presumption that it will be Adhered to.—Effect of Presumption.—Where the trial court, by sustaining the demurrer, held that such facts as were pleaded, even if proven, would not constitute a waiver, the presumption is that having by the ruling adopted such a theory it adhered to it throughout the case, and admitted no evidence, and made no finding relative to such alleged facts. It will be presumed, also, that whatever evidence, if any, the appellant may have had in support of this paragraph of reply it was not offered, and would, therefore, not appear in the record. The appellant had the right to assume that the court would adhere to the theory indicated by

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its ruling in sustaining the demurrer. Under this state of facts the Supreme Court will not look to the finding of facts by the court and to the conclusions of law for assurance that there was no waiver of the forfeiture.

From the Wayne Circuit Court.

F. M. Finch, J. A. Finch and T. J. Study, for appellant.
F. Winter and J. B. Elam, for appellees.

MCBRIDE, C. J.—This was a suit by Replegle, the appellant, to recover on a policy of fire insurance issued by the American Insurance Company, and re-insured in the Home Insurance Company.

The policy, a copy of which was filed with the complaint, contained the following provision :

“6. It is further provided and agreed that if the assured shall have, or shall hereafter obtain, any other insurance on the property hereby insured, or any part thereof, without the consent of the secretary of this company written thereon, * * * * * this policy shall be void, and the assured shall not be entitled to recover from this company any loss or damage which may occur in or to the property hereby insured, or any part or portion thereof.”

The appellees answered in four paragraphs. The first was a general denial, while the remaining three were based upon allegations that, after the policy was issued, and before the loss occurred, the assured, in violation of the condition above stated, without the knowledge or consent of the appellees, procured other and additional insurance on the same property in the Ohio Farmers' Insurance Company.

The sufficiency of the special answer is questioned on the ground that no copy of the policy upon which the suit was brought was filed with them. This was not necessary. As above stated, a copy of it was filed with the complaint. The answers were in confession and avoidance, and did not seek any affirmative relief. They necessarily admit the truth of all material and well pleaded facts in the complaint and the

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correctness of all exhibits properly filed as parts of it. The ruling of the circuit court was right for this and other reasons. It is also contended that two of the paragraphs are bad because it is not averred that the policy in the Ohio Farmers' Insurance Company was in force when the loss occurred. If the policy in suit was avoided by the additional insurance, it was avoided when the additional policy was taken, and it is immaterial whether the new policy was still in force when the loss occurred or not.

The appellant filed a reply in four paragraphs. The first is a general denial. The second alleges in substance that the policy issued by the Ohio Farmers' Insurance Company contained a provision relating to other insurance similar to that contained in the policy sued on, and alleges that when it was issued the policy sued on was in full force; that the assured did not notify the Ohio Farmers' Insurance Company of its existence, and that that company never at any time, nor in any manner, consented to the additional insurance. It is insisted that by reason of these facts the policy issued by the Ohio Farmers' Insurance Company was void, and did not constitute additional insurance so as to avoid the first policy.

This is the second appeal of this case, the decision on the first appeal being reported under the title, *American Ins. Co. v. Replogle*, 114 Ind. 1. In the opinion there rendered the sufficiency of this paragraph of reply was fully considered, the late Judge MITCHELL announcing the opinion for the court. Counsel for the appellant question the correctness of the conclusion there reached. It would be sufficient to say that, right or wrong, it is the law of the case and must stand. We will, however, add, that that opinion has our unqualified approval. We regard it as a fair and correct exposition of the law. The fourth paragraph of reply alleges, in substance, that the Ohio Farmers' Insurance Company is a mutual company; that the assured became a member of the company by taking a policy, and that the charter

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of the company contained a provision relating to additional insurance substantially like that contained in the policy. The argument is, in substance, that as the charter forbids such insurance, and declares policies issued in violation thereof void, the policy was absolutely void for want of power in the company to issue it, and, therefore, constituted no additional insurance. It is undoubtedly true, that the charter of the company entered into and formed a part of the policy. Assuming that the policy issued by the Ohio Farmers' Insurance Company was void by reason of the pre-existing policy, yet, in a suit upon that policy, its invalidity could only be shown by the proof of extrinsic facts. There was nothing upon the face of the policy, or in the terms of the charter, to indicate the existence of the additional fact necessary to avoid it. It must be presumed that the party procuring it did so with the intention of availing himself of the protection which it *prima facie* afforded him.

We quote, as *apropos*, the language of Judge Mitchell in *American Ins. Co. v. Replegle, supra*.

"The primary purpose of inserting conditions against other insurance is to protect the company from the hazard of over insurance. The condition implies that the insurance company will decline the obligation of insurer whenever the relations of the owner to the property are such that he would be benefited by, and might, therefore, have a motive for, its destruction. Consequently, it aims to secure the continued vigilance and co-operation of the owner in preserving the property, and to compel him to maintain such an interest in, and relation to, the property as to have no motive for the relaxation of his care over it. * * Whenever, therefore, the property owner, in violation of a condition such as that in question, applies for and obtains a second policy, valid upon its face, with the intent and purpose to carry the second policy as valid insurance, without giving notice thereof, he has thereby defeated the whole policy and purpose of the condition, and has done that which constitutes a complete defence to an

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action on the first policy. As was in effect said in *Lackey v. Georgia Home Ins. Co.*, 42 Ga. 456: If the property owner *thinks* the second policy is good, and intends it to be good, the danger of burning is the same as if it really were good."

In our opinion the fourth paragraph is no better than the second.

The third paragraph of reply is as follows:

"For further reply to the second, third and fourth paragraphs of answer herein the plaintiff says that after the destruction by fire of the property mentioned in the complaint herein, the defendants, with a full knowledge of all the facts set out in said paragraph of answer, required plaintiff, upon notice by him to them of said destruction of said property by fire, to make due and full proofs of said destruction by fire of said property, and of his loss thereby, and required him, after he had made said proofs, which he deemed sufficient, to make out additional proofs of said destruction of said property by fire, and required him to furnish plans and specifications of the buildings so destroyed, and required him to go from his home in Wayne county, Indiana, to Indianapolis, Indiana, and learn what additional proofs were required, all of which the plaintiff did at great expense to him in money expended, and in time devoted to making said proofs and said additional proofs, in making and procuring said plans and specifications, and in going to said city of Indianapolis, all at an expense in money and time of fifty dollars (\$50). And plaintiff says that during all this time defendant, though fully advised, and knowing all the matters set up in said paragraphs of answer, did not notify plaintiff that any objection would be made by defendants to the payment of the sum secured by said policy of insurance on account of any of the matters set forth in said paragraph of defendant's answer. Wherefore plaintiff alleges a waiver of said defenses to this action, and avers that the defendants are, or ought to be, estopped to defend against this suit on account of any of said matters. Wherefore," etc.

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An insurance company may, unquestionably, waive the right to avoid a policy for a breach of some of its conditions. Any act done after notice of the breach of conditions, which recognizes the validity of the policy, is a waiver of the right to avoid for that reason. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Cannon v. Home, etc., Ins. Co.*, 53 Wis. 585; *Gans v. St. Paul Fire, etc., Ins. Co.*, 43 Wis. 108; *Schreiber v. German American, etc., Ins. Co.*, 43 Minn. 367; *Phoenix Ins. Co. v. Lansing*, 15 Neb. 494; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; *Insurance Co. v. Norton*, 96 U. S. 234; *Prentice v. Knickerbocker Life Ins. Co.*, 77 N. Y. 483; *Brink v. Hanover Ins. Co.*, 80 N. Y. 108; *Osterloh v. New Denmark, etc., Ins. Co.*, 60 Wis. 126; *Viele v. Germania Ins. Co.*, 26 Iowa, 9.

In the case of *Titus v. Glens Falls Ins. Co.*, *supra*, the court says: "When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interest, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver can not be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defence of a suit commenced therefor, allege the forfeiture. But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel."

In *Cannon v. Home, etc., Ins. Co.*, *supra*, the Supreme Court

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of Wisconsin says: "The proposition upon which counsel rely is this: that a party can not occupy inconsistent grounds or positions; that one who relies upon the forfeiture of a contract can not, at the same time, treat the contract as an existing, valid one, nor call upon the other party to the contract to do anything required by it; or, to apply the proposition to the precise facts in the case, that, as the defendant, in its correspondence with the attorneys of the plaintiff, after full knowledge of the forfeiture, saw fit to call for additional proofs of loss, recognizing by this act the continued validity of the policy, it could not, after the plaintiff had gone to the expense and trouble of furnishing these proofs, change its ground, and claim that the policy was no longer in force. We think this position is sound in law and amply sustained by the doctrine of the adjudged cases."

To the same effect, and equally emphatic, is the case of *Gans v. St. Paul Fire, etc., Ins. Co., supra*.

The proposition above quoted from *Titus v. Glens Falls Ins. Co., supra*, was approved by this court in *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84 (93).

If these cases decide the law correctly (and we think they do), the reply before us is good. It is expressly averred that the appellee, with full knowledge of the facts, not only required the appellant to make proofs of his loss, but, after he had made proofs, required him to make additional proofs, and to furnish plans and specifications of the buildings destroyed, and to go from his home in Wayne county to Indianapolis, at an expense of fifty dollars.

Appellees insist, however, that conceding the reply to be good, and that the court erred in sustaining a demurrer to it, the error was harmless, for the reason that evidence of the facts averred was admissible under the allegations of the complaint that the appellant had furnished the proofs of loss required by the policy, and had kept and performed all conditions, etc. And that it was also admissible under the general denial. Evidence was not only admissible under

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the averments of the complaint that the assured had made the proofs required by the policy, but was necessary to justify a recovery. The averments of this reply, however, are that the assured not only made the proofs required, but was required to and did make *additional* proofs, and was required to *furnish plans and specifications of the buildings destroyed*. By the terms of the policy the assured could only be required to furnish plans and specifications in case the company elected to rebuild the destroyed buildings. Such an election of necessity affirms the validity of the policy. Evidence of such requirements was not admissible, either under the averments of the complaint or of the reply of general denial. So, also, of the requirement to visit Indianapolis.

Counsel also ask us to look to the finding of facts by the court, and to the conclusions of law, for assurance that there was no waiver of the forfeiture.

The question as presented to us is one of pleading alone. Did the court err in sustaining a demurrer to this paragraph of reply? We can get no aid in the determination of this question from the finding, or from an examination of the evidence. The court by its ruling on the demurrer held that such facts as were pleaded, even if proven, would not constitute a waiver. The presumption is that the court, having by this ruling adopted such theory, adhered to it throughout the case, and admitted no evidence, and made no finding relative to such alleged facts. Elliott App. Proc., section 591, and authorities cited. It will be presumed, also, that whatever evidence, if any, the appellant may have had in support of this paragraph of reply, was not offered, and would, therefore, not appear in any manner in the record.

It was the right of the appellant to assume that the court would adhere to the theory indicated by its ruling in sustaining the demurrer, and he was not required to, and presumptively would not, offer any testimony relating to the questions covered by such ruling. We must presume that the cause was tried and decided upon that theory. The

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theory being erroneous, and relating to a vital and controlling question, its effect being to exclude such question entirely from the record, we can not, from an examination of the entire record, say that a just conclusion was reached.

The judgment is, therefore, reversed, with costs.

Filed Oct. 8, 1892.

No. 15,905.

HUTCHINGS ET AL. v. HAY.

139	369
144	116
132	369
151	533

PRACTICE.—*Appeal to Supreme Court.—Amended Pleading.—Omitted From Record.—Demurrer to Complaint as a Whole.*—Where a complaint was filed in two paragraphs, and afterwards the second paragraph was amended, and the record contains said paragraph as originally filed but not as amended, a judgment overruling a demurrer, which alleged that the complaint failed to state a good cause of action will not be reversed even if the first paragraph of the complaint was bad, as such an assignment of error can only be made against the complaint as a whole.

SAME.—*Evidence*—The amended paragraph of complaint not being in the record, a question relating to the evidence sought to be presented by the motion for a new trial can not be considered.

From the Floyd Circuit Court.

J. K. Marsh, for appellants.

M. Z. Hammond, for appellee.

OLDS, J.—The record in this case is not such as to present for our decision the questions discussed by counsel for the appellant. Errors are assigned and discussed on the rulings of the court in overruling the demurrers to the first and second paragraphs of complaint, and that neither of said paragraphs states facts sufficient to constitute a cause of action; also on the ruling of the court in overruling the appellants' motion for a new trial. There appear in the record copies of two paragraphs of complaint, the first filed and

a demurrer addressed to it; afterwards a second filed, and without a ruling on the demurrer to the first, an answer in denial is filed to both paragraphs. The record further shows that afterwards by leave of the court the appellee amended his second paragraph of the complaint by interlineations, and a demurrer was filed to it and a ruling overruling the demurrers is thus shown, and answers are filed to the second paragraph of the complaint, a reply in denial filed to the second paragraph of the answer, and a trial is had, a motion for a new trial is filed by appellants and overruled.

The record does not purport to set out the second paragraph of the complaint as amended, but it purports to set out the paragraph as originally filed; but it is nowhere shown that the paragraph as copied into the record contains the matter inserted into such paragraph by interlineations, and on the contrary, as appears by the record, the paragraph as inserted in the record is the paragraph as originally filed and not as amended. As the record is, no question is presented.

The first paragraph of the complaint is to quiet title. It is apparent that the judgment is not upon the first paragraph, but upon a paragraph for specific performance of contract.

The second paragraph of complaint not being in the record, the judgment must stand, even if the first paragraph is bad. An assignment of error that the complaint does not state facts sufficient to constitute a cause of action can only be made against the complaint as a whole. *Louisville, etc., R. W. Co. v. Peck*, 99 Ind. 68; *Elliott's Appellate Procedure*, section 474.

The second paragraph of the complaint as amended not being in the record we can not consider the question discussed relating to the evidence sought to be presented by the motion for a new trial.

Judgment affirmed, with costs.

Filed October 8, 1892.

The State, ex rel. McPherson, v. Beckner et al.

No. 14,674.

THE STATE, EX REL. MCPHERSON, v. BECKNER ET AL.

REPLEVIN.—*Unlawful Levy by Constable.—Resistance by Householder.—Trespass.*—Where a constable, who had a writ of replevin for a sewing machine, went to the dwelling-house of a third person with whom the defendant in replevin was living, and stated to the householder that he had a writ for the machine of Mrs. S., and the same was pointed out to him, but he went away, without taking possession of it, and he returned in the afternoon of the same day and forced open the outer door of the house, which the householder had partly opened, but which she was endeavoring to close when she ascertained who he was, the constable was guilty of a trespass, which rendered his subsequent acts unlawful, and justified the householder in resisting by force his further progress in serving the writ.

SAME.—*Unlawful Acts of Constable.—Liability of Sureties on His Bond.*—The unlawful conduct of the constable took place in the discharge of his official duties, and not while he was acting merely by color of his office, and the sureties on his bond are liable for injuries sustained by the householder in attempting to prevent him from serving the writ.

SAME.—*Breaking of Outer Door.—What will not Justify.*—The sewing machine being in the house of the relatrix without fraud, the shifting of the machine to another room after the constable's first visit, and the substitution of another machine in its place, would not in any manner authorize the officer to break the outer door, he necessarily being in ignorance of the change, and having the right when once lawfully admitted to break down inner doors in the discharge of his official duties.

LEVY.—*What Constitutes a Valid Levy Upon Personal Property.—When Outer Door May be Broken.*—To constitute a valid levy upon personal property, the act of taking possession must be of such a character as would make the officer, if not protected by the process, liable for trespass. When possession is taken in obedience to a writ, and in its partial execution, the officer may, upon his return to complete his levy, if necessary, break open the outer door.

From the Tippecanoe Circuit Court.

T. F. Gaylord, for appellant.

J. M. Dresser, for appellees.

MILLER, J.—This was an action brought by the relator against a constable and his surety on his official bond. The cause was tried by a jury and a special verdict returned.

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Each party made a motion for a judgment upon the verdict. The motion of the appellant was overruled, and that of the appellees was sustained.

The only questions involved in this appeal relate to the ruling upon these motions. The questions presented are:

First. Had the officer authority to enter the residence of the relatrix to serve the civil process in his hands under the circumstances disclosed in the verdict of the jury?

Second. If no such authority existed, do the wrongs and injuries complained of afford a right of action on the bond?

The facts stated in the verdict, so far as we need call attention thereto, are substantially as follows:

The relatrix and her two daughters composed a family of which she was the head, and occupied as a residence a certain dwelling house in the city of Lafayette. Mrs. Mattie C. Smith, one of the daughters, had in her possession in said dwelling a sewing machine. On the 8th day of February, 1883, the Howe Sewing Machine Company brought an action of replevin before a justice of the peace against Mrs. Smith for the possession of said sewing machine, and in the forenoon of that day said justice issued and delivered to the appellee Beckner, as constable, a writ of replevin commanding him to take said sewing machine and to deliver the same to said Howe Sewing Machine Company. Immediately upon receiving said writ said constable called at the residence of the relatrix and was by her admitted into the same. After having been admitted into said dwelling house he stated to the relatrix that he had a writ of replevin for the sewing machine of said Mattie C. Smith, who, although a resident of said dwelling-house, was temporarily absent on said day; that at said time said sewing machine was, without fraud, in said dwelling-house; that the relatrix pointed out to him the sewing machine which was then and there in the northeast corner of the sitting room; that said Beckner did not take possession of said sewing machine, but went away without having done so; that after said Beckner went away

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from the dwelling-house the relatrix took said sewing machine and put the same in a bed-room adjoining the sitting-room on the west, locked the door of the bed-room, and took and placed a sewing machine belonging to her daughter Anna in the place where the sewing machine of said Mattie C. Smith had been when it was pointed out to said Beckner in the morning.

On the afternoon of the same day Beckner, in company with two other persons whom he had engaged to assist him to execute his writ, went to said dwelling-house for the purpose of executing said writ by taking possession of said sewing machine, and with the intention of taking possession of the same, and if necessary carrying it away by force; that said Beckner, upon arriving at said dwelling-house, rang the door bell attached to the front and outer door; the relatrix, upon going to said door, opened it a few inches, when said Beckner, upon said door being so opened, slipped his cane in, and the relatrix thereupon said, "Oh, it is you, is it?" and immediately, and before the said Beckner had entered or partly entered said dwelling-house, attempted, by leaning and pushing against the said door, to close the same, and to keep said Beckner from entering said dwelling; that said Beckner called to his associates to come, and then and there, with the purpose and object of executing his said writ as constable as aforesaid, by obtaining possession of the sewing machine therein called for, and claiming to act under the power and direction of said writ, pushed with great force on said outer door of said dwelling-house, and forced the same open against the will and power of said relatrix, who was thereby thrown back on a bannister near said door and injured. After the officer had gained an entrance into the dwelling, he proceeded to execute the command of his writ, the relatrix resisting him at every step. During the struggle the relatrix received further injuries. This action was brought to recover damages because of such injuries.

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It is contended by counsel for the appellant that in view of the facts disclosed by the verdict the constable was acting *virtute officii*, not merely *colore officii*. With this contention we are in accord. The constable had a legal process, and his sole purpose seems to have been the execution of the command which it carried to him. There is some conflict of authority as to whether or not there is a right of action on the bond of a ministerial officer for an unlawful act done *colore officii*. Brandt Sure., section 566; *Commonwealth v. Cole*, 46 Am. Dec. 506, and notes. But when the officer is acting *virtute officii*, the authorities all agree that a suit will lie upon his bond. In *Clancy v. Kenworthy*, 74 Iowa, 740, the sureties on the bond of a constable were held liable in an action for a breach of an official bond caused by an unlawful arrest made by the officer. In *Cash v. People, etc.*, 32 Ill. App. 250, the sureties were held liable for an unlawful assault made by a constable in making an arrest.

It necessarily follows that if the constable in the case under consideration was guilty of unlawful conduct in the discharge of his official duties, to the injury of the relatrix, he and his surety must respond in damages, and the trial court was in error in rendering judgment for the appellee. Upon the other hand, if what the constable did was under the circumstances justifiable, then the court did not err.

The writ under which the officer was acting was but a civil process, and did not authorize him to force the outer door of a dwelling. 2 Freeman Ex., section 236; *Syndacker v. Brosse*, 51 Ill. 357; note to *McGee v. Givan*, 4 Blackf. 16; *Curtis v. Hubbard*, 1 Hill, 336; *Curtis v. Hubbard*, 4 Hill, 437.

In actions of replevin a sheriff may, under our statute, section 1271, R. S. 1881, in some cases cause a building or enclosure to be broken open, but no similar statute gives such right to a constable. Except as modified by statute, the common law principle that every man's house is to be

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treated as his castle and kept sacred from forcible intrusion, prevails in this State.

The verdict informs us that when the constable went to the dwelling house of the relatrix in the forenoon, he stated to her that he had a writ of replevin for the sewing machine of Mrs. Smith, and the same was pointed out to him, but that he did not take possession of the machine, but went away without having done so; also, that in the afternoon he went to the dwelling-house with his assistants "for the purpose of executing his said writ by taking possession of said sewing machine." It appears that all he did in the forenoon was to ascertain the presence of the sewing machine in the dwelling-house of the relatrix, taking no steps to take the same into his own possession. Mrs. Smith, the owner of the machine, and defendant in the action, not being present, could not have waived any of her rights of possession.

The essential part of a writ of replevin is the command to seize the property; this, therefore, is the first duty of an officer on receiving such a writ. Cobbey Replevin, section 633. "Service on the property means actual seizure. A constructive seizure will not do." Cobbey Replevin section 634.

There is much similarity between taking possession of personal property under a writ of replevin and a levy on the same under a writ of execution. In order to constitute a levy upon personal property, possession must be taken, a mere paper levy will not in general be sufficient. *Standard Oil Co. v. Bretz*, 98 Ind. 231; *Dawson v. Sparks*, 77 Ind. 88; *Duncan's Appeal*, 37 Pa. St. 500. In order to constitute a valid levy upon personal property, the act of taking possession must be of such a character as would make the officer, if not protected by the process, liable for trespass. *Portis v. Parker*, 8 Tex. 23; *Beekman v. Lansing*, 3 Wend. 446; *Davidson v. Waldron*, 31 Ill. 120 (138); Murfree Sheriffs, section 523.

It seems that on the occasion referred to the officer did

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nothing by which the property described in his writ passed into the custody of the law.

We think it clear that if the officer had, in obedience to his writ and in its partial execution, taken possession of the property, he might, upon his return to complete his levy, if necessary, have broken open the outer door. *Freeman Ex.*, section 256.

A distinction has been made in some cases between the right of an officer to break the outer door of a dwelling-house in the service of an ordinary execution, and of a writ which requires him to take possession of a particular thing, such as a writ of replevin, holding that in the latter case he may, after first demanding admittance, break down the outer door. *Keith v. Johnson*, 1 Dana, 604 (25 Am. Dec. 167); *Howe v. Oyer*, 50 Hun, 559.

In the latter case the officer was proceeding under a statute giving him extraordinary powers where the property had been concealed, somewhat similar to that given a sheriff by our code (section 1271), and is therefore not in point here. The writ of replevin mentioned in *Keith v. Johnson*, *supra*, was such as issues after the final ownership of the property had been determined by the judgment of a court, and the owner of the dwelling been commanded to surrender the same to the true owner. The case is not an authority under a procedure such as is provided by our code.

If the officer had no authority to force the outer door of the dwelling-house of the relatrix in the execution of his writ, his conduct as disclosed in the verdict amounted to a trespass.

In *State v. Armfield*, 2 Hawks, 246 (11 Am. Dec. 762), Wright, a constable, having a writ of *fi. fa.* against the property of Patterson, went with Armfield to Patterson's house to make the levy. A member of the family, seeing their approach, jumped into the house, and attempted to shut the door to prevent their entrance, but while in the act of shutting the door, and before it was entirely closed, though so

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far closed as to require force to open it, Wright pushed against it and entered the house, Armfield being present. The court instructed the jury that if the officer, aided and abetted by the defendant, forced open the door, they were guilty, and the process was no protection to them. In an opinion affirming a judgment of conviction, the court said: "I am of opinion that the charge of the court was correct in this case, and that the defendant was properly convicted. The law is clearly settled that an officer can not justify the breaking open an outward door or window in order to execute process in a civil suit; if he doth, he is a trespasser. A man's house is deemed his castle, for safety and repose to himself and family; but the protection and repose would be illusive and imperfect if a man were deprived of the right of shutting his own door when he sees an officer approaching to execute civil process. If the officer can not enter peacefully before the door is shut, he ought not to attempt it, for this unavoidably endangers a breach of the peace, and is as much a violation of the owner's right as if he had broken the door at first."

We regard this case as a correct enunciation of the law applicable to the question under consideration.

In our opinion the officer in forcing an entrance into the dwelling-house was guilty of a trespass, which rendered his subsequent acts unlawful, and justified the relatrix in resisting his further progress in serving the writ by force. *Curtis v. Hubbard*, 4 Hill, 437.

The jury found that the sewing machine of Mrs. Smith was in the dwelling-house of the relatrix, without fraud. We are unable to see how the shifting of the machine to another room and the substitution of another in its place could in any manner authorize the officer to break the outer door, he necessarily being in ignorance of the change, and having the right, when once lawfully admitted, to break down inner doors in the discharge of his official duties.

We regard this case as one in which justice demands that a new trial be awarded rather than a mandate to render judg-

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ment for the appellant upon the verdict. *Murdock v. Cox*, 118 Ind. 266; *Shoner v. Pennsylvania Co.*, 130 Ind. 170.

Judgment reversed, with instructions to grant a new trial.

Filed Oct. 7, 1892.

No. 15,910.

SCOTT ET AL. v. STRINGLEY.

DRAINAGE.—Repair of Ditch.—Performance of Work.—Surveyor's Authority Concerning.—Where a surveyor is acting within the scope of his authority in repairing a ditch, the question as to whether he adopted the best or cheapest plan for its performance is not open to inquiry. The fact that the workmen were paid by the day—no fraud or collusion being claimed—and that no competition was invited, does not furnish an excuse to the land-owner for a refusal to reimburse the county for the expense of such work.

SAME.—Obstruction of Ditch by Others.—When no Defence to Payment of Assessments.—Upon appeal to the circuit court from assessments levied by a county surveyor for the repair of a ditch, the appellants can not escape liability on the ground that a large part of the obstruction which rendered the cleaning of the ditch necessary was occasioned by the cattle of some of the other land-owners obstructing the ditch, and that no additional assessment had been levied against such land-owners where they made no effort to prove the amount of additional cost in removing such obstructions. In the absence of such proof the presumption is that the additional cost was merely nominal.

SAME.—Surveyor Exceeding His Authority.—Effect on Payment of Assessments.—The fact that a county surveyor exceeded his authority in repairing a ditch will not relieve the land-owners from paying for benefits received by the doing of such work as was within the jurisdiction of the surveyor, and where the assessments levied fall short of the amount paid for the repairs by the county, the Supreme Court will presume, in the absence of evidence to the contrary, and in favor of the findings of the lower court that the appellants' lands were not assessed for more than their just proportion of legitimate cost for repairing the ditch.

SAME.—Lands not Liable for Repairs.—Where lands are not assessed for the construction of a ditch, they can not be assessed for its repair. Elliott's Supp., section 1193.

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From the Fulton Circuit Court.

W. P. Hough, E. Myers and S. Keith, for appellants.

M. A. Boker, J. Rowley, G. W. Holman and R. C. Stephenson, for appellee.

COFFEY, J.—Section 1193, Elliott's Supplement, provides, among other things, that after the construction of any public ditch the county surveyor of the county in which the proceedings were had for its construction shall keep the same in repair to the full dimensions as to width and depth as required in the original specifications, and certify the cost thereof, including his own *per diem*, to the county auditor, who shall draw his warrants on the county treasurer, payable to the persons to whom the money is owing, which warrants shall, for the time being, be paid out of the county revenue. It provides that the money thus paid out of the county revenue shall be replaced by assessments against the land benefited by the work. It also provides that any person against whose lands assessments are made for that purpose, feeling himself aggrieved thereby, may appeal therefrom to the circuit court. Such appeal is tried by the court, without a jury, and the only question for trial relates to the cost of such repair and what amount thereof shall be assessed against the land of the party appealing.

Assuming to act under the provisions of this statute, the surveyor of Fulton county began the work of cleaning out what is known as the Walters and Cannon ditch in that county, but before the completion of the work his term of office expired and the work was completed by the appellee, who was his successor in office.

Both the appellee and his predecessor issued certificates to those performing the work as it progressed, and those to whom the money was due received their pay out of the county treasury.

For the purpose of reimbursing the county for the money thus paid out the appellee, as the surveyor of the county,

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made assessments against the land benefited, and in doing so he assessed land located on what is known as the Walter Mogle ditch, as well as the lands located on the Walters and Cannon ditch. Seventeen of the owners of the land thus assessed, feeling aggrieved by the assessment, appealed therefrom to the circuit court, where, upon a trial, the assessments made against the land on the Mogle ditch were declared illegal, and were set aside, but the assessments made against the land located on the Walters and Cannon ditch were affirmed.

From the judgment affirming these assessments this appeal is prosecuted.

The only questions in the case for our consideration relate to the action of the court in overruling the motion of the appellants for a new trial. It is not denied by the appellants that the county actually paid out the sum of money for which it claims reimbursement, but it is contended :

First. That there is a forty-acre tract of land at the mouth of the ditch, through which it runs, and which was benefited by the work, against which no assessment was made.

Second. That a large part of the work of cleaning out the ditch was done under the supervision of one O'Dell, who employed men by the day to perform the work, and that it was done without advertising the work in order to invite competition.

Third. That a large part of the obstruction which rendered the cleaning of the ditch necessary was occasioned by cattle running on pasture land through which the ditch runs, and that no additional sum was assessed against such land to pay for the removal of such obstructions, but the cost of so doing is distributed throughout the entire assessment.

Fourth. That the original specifications for the ditch established it at the width of two feet at the bottom, with a slope of the sides at an angle of forty-five degrees, and under pretence of cleaning the same out, it was enlarged so as

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to make it three feet wide at the bottom, with a corresponding increase in width at the top.

Before a consideration of the objections urged by the appellants it is not improper to state the general principles of law, as settled by the decisions of this court, by which we are to be guided in the decision of this cause.

The decision of the county surveyor as to the necessity of repairing a public ditch is final, but the statute which limits the questions for trial upon appeal to the circuit court to the question of the cost of such repair, and the amount which shall be assessed against each tract of land benefited, does not preclude an inquiry into the question as to whether the surveyor acted within his jurisdiction. The jurisdiction, powers and duties of the surveyor are fixed and limited by statute, and he can not, under pretence of repairing, enter upon a new scheme of drainage, but is limited to the duty of repairing such ditches as have already been constructed. *Markley v. Rudy*, 115 Ind. 533; *Kirkpatrick v. Taylor*, 118 Ind. 329; *Weaver v. Templin*, 113 Ind. 298; *Amoss v. Lassell*, 122 Ind. 36.

Assuming that the surveyor was acting within the scope of his authority in repairing the ditch, the question as to whether he adopted the best or cheapest plan for its performance is not, in our opinion, open to inquiry. Our attention has not been called to any provision of law which requires him to advertise for bids; and as he is the sole judge of the necessity of making repairs, we think he is also the judge of the means to be employed to accomplish the work. It is not denied that the work done under the supervision of O'Dell cost the amount of money paid for it out of the county treasury, nor is it claimed that any fraud or collusion intervened. The fact, therefore, that the workmen were paid by the day, and that no competition was invited, furnishes no excuse for a refusal to re-imburse the county for the expense of such work.

There was no effort made by the appellants, in their case

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in chief, to show that the ditch in question had been obstructed by cattle or other stock crossing it. The fact that it had been so constructed was called out upon an examination of the witnesses called by the appellee. So far as we have been able to ascertain from a careful reading of the evidence, there was no effort made to prove the amount of additional cost in removing such obstructions; so that the court was left wholly without the means of adjusting the assessments so as to relieve those on whose land such obstructions were not found from such additional cost, if any were incurred. We can not presume that such additional cost was more than nominal, without some proof showing the amount.

It is shown by original specifications that the ditch in question was established at a bottom width of two feet. That portion of the ditch repaired by O'Dell was given a bottom width of three feet. There is much conflict in the evidence as to whether it was given a corresponding increase in width at the top.

In thus enlarging the ditch we think the surveyor exceeded his jurisdiction. His duties were to so repair the ditch as to restore it as nearly as possible to its original condition. But it does not follow that because he exceeded his jurisdiction in this particular the appellants are to be relieved from the payment of any assessments. It would be unjust and inequitable to hold that because the surveyor exceeded his jurisdiction in some particular the appellants should be relieved from the payment for benefits received by the performance of such work as came within the jurisdiction of the surveyor. *City of Indianapolis v. Gilmore*, 30 Ind. 414. It appears from an examination of the record before us that the assessments of land situated on the Walters and Cannon ditch is more than one hundred and fifty dollars short of the amount paid out for the improvement of that ditch. This was occasioned by relieving the lands on the Mogle ditch from the assessments made against them to pay for this work. The appellants, on the trial of the

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cause, endeavored to show the increased cost occasioned by widening the ditch, but the evidence upon that subject was not of a character to force the conclusion upon the mind of the trial court that the increase exceeded the amount for which lands on that ditch are not assessed. We must presume, therefore, in favor of the finding of the circuit court that it reached the conclusion that the lands of the appellants were not assessed with more than their just proportion of legitimate cost of repairing the ditch. With that conclusion we can not interfere.

The forty-acre tract of land situated at the mouth of the Walters and Cannon ditch is also situated on what is known as the Buckingham ditch which furnishes the outlet for the former. It was, perhaps, assessed for the construction of the latter ditch, and was for that reason not assessed for the construction of the Walters and Cannon ditch. However this may be, it is certain that it was not assessed for the construction of the Walters and Cannon ditch, and by the very terms of the statute above referred to, is not subject to assessment to keep it in repair.

Having carefully examined all the questions in this case presented for our consideration, we are of the opinion that there is no error in the record of which the appellants have a right to complain.

Judgment affirmed.

Filed Oct. 6, 1892.

Percifield et al. v. Black.

No. 15,698.

PERCIFIELD ET AL. v. BLACK.

CONTRACT.—*Written or Parol.*—*Presumption as to.*—Where an action is brought for the specific performance of a contract for the sale of real estate, and there is no averment that the contract is in writing, it will be presumed that it was a parol contract.

SAME.—*Sale of Real Estate.*—*Parol Contract.*—*Wife can not Constitute Husband her Agent.*—The wife being incapacitated by section 5117, R. S. 1881, to make a parol contract for the sale of her real estate, she can not constitute her husband her agent to make it for her.

ESTOPPEL.—*Married Woman.*—*Contract.*—A wife can not be estopped from denying her capacity to make a contract.

From the Brown Circuit Court.

F. T. Hord, M. D. Emig and R. L. Coffey, for appellants.

OLDS, J.—This is an action by the appellee against the appellants, who are husband and wife, for the specific performance of a parol contract for the sale of the wife's land.

The complaint alleges that the husband, as the agent of the wife, and having full power to do so, contracted with the appellee for the sale of the wife's land, and that the husband himself joined in the contract; that the agreed price was \$412.50. As part payment appellee assumed the payment of a mortgage on the land for \$200; that the appellee took possession in pursuance of the contract, repaired the buildings, made fence, put out an orchard, and made other lasting and valuable improvements, with the knowledge and consent of appellants; paid the mortgage, and paid appellants \$154; that after receiving the money appellants averred their willingness to convey the land, and appellee made other lasting and valuable improvements, and tendered appellants the balance of the purchase-money, and demanded a conveyance; that appellants refused, and still refuse, to convey; that appellee is now ready and willing to pay any sum the court may find due and order paid in a decree ordering a

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conveyance, and offers to bring the money into court, and prays for a judgment and decree ordering the appellants to execute a deed to the appellee for the land, and for all proper relief.

To this complaint a demurrer for want of facts was filed and overruled, and this ruling is assigned as error.

It not being averred that either the authority of the husband or the contract of sale was in writing, it will be presumed that they rested in parol. *Pulse v. Miller*, 81 Ind. 190; *Carlisle v. Brennan*, 67 Ind. 12; *Langford v. Freeman*, 60 Ind. 46.

It is the policy of the law of this State to protect the wife against the sale or encumbrance of her land by her husband, and to protect her land from liability for the debts of the husband.

Section 5116, R. S. 1881, provides that the wife's lands shall not be liable for the debts of her husband, and that the wife shall have no power to encumber or convey her lands except by deed in which her husband shall join.

Section 5117 declares that the wife shall not enter into any executory contract to sell, convey or mortgage her real estate; nor shall she convey or mortgage the same unless her husband join in such contract, conveyance or mortgage; but it provides that she may be bound by estoppel *in pais*, like any other person.

The statute of frauds (section 4904) declares that no action shall be brought upon any contract for the sale of lands unless such contract, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, etc.

It is manifest that section 5117, *supra*, declaring that the wife shall not enter into any executory contract to sell or convey or mortgage her real estate unless her husband joins in such contract, relates to a written contract and that all power to bind herself by contract for the sale or conveyance

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or mortgaging her real estate is withheld, except it be by a written contract in which her husband shall join, and to bind the wife by an executory contract for the sale of her real estate, the contract must be such a contract as the law recognizes as a valid one for the sale of real estate, and such a one as a suit may be based upon, viz., a written contract and in such contract her husband must join. This must necessarily have been the intention of the legislature, for no other contract, except a written contract, is recognized as valid and enforceable for the sale of real estate, and a contract is referred to in this section in connection with and placed on the same basis as a deed or mortgage, and it was, as we think, certainly the intention that to bind the wife by an executory contract for the sale or incumbrance of her land the contract, like the conveyance or mortgage, must be in writing, and her husband must join in the same.

Placing the construction we do upon the statute, it follows that a parol contract for the sale of the wife's lands is absolutely void, the wife having no authority to make such a contract; and, being incapacitated to make such a contract herself, she could not constitute her husband her agent to make it for her. This leaves but the question of estoppel to determine, and that has heretofore been settled adversely to the appellee by the decisions of this court. A wife can not be estopped from denying her capacity to make a contract. In the case of *Cook v. Walling*, 117 Ind. 9, in speaking of the question of an estoppel by a married woman, this court states the rule clearly, and says:

“When, however, the contract relates to matter concerning which all the common law disabilities continue, so that the contract is utterly void for want of power or capacity to make it, the doctrine of estoppel can not be invoked in order to remove the incapacity. In other words, while a married woman may be estopped by affirmative representations concerning the character of a contract, which, if her representations be true, she is notwithstanding her coverture, un-

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der no legal disability to make. She can not, by her own act or representation, remove her legal incapacity to make a contract, which coverture alone, under any and all circumstances, disqualifies her from making except in a prescribed way." So in this case, the coverture of Mrs. Percifield incapacitated her from making an executory contract for the sale of her real estate except in the manner prescribed by the statute, viz.: by a written contract, in which her husband joined, and she can not be estopped from setting up the invalidity of the parol contract by reason of her incapacity to make the same. *Long v. Crosson*, 119 Ind. 3.

The complaint does not state facts entitling the appellee to the relief asked.

The court erred in overruling the demurrer to the complaint.

Judgment reversed, with instructions to the circuit court to sustain the demurrer to the complaint.

Filed October 7, 1892.

No. 15,923.

THE STATE, EX REL. CROY, ADMINISTRATOR, v. GREGORY ET AL.

INSTRUCTIONS TO JURY.—*Joint Exception.*—*Separate Instructions not Brought in Review.*—A joint exception to the giving of two instructions, assigned as a reason for a new trial, does not bring in review the instructions given severally or separately, and one of such instructions being conceded to be correct, the other will not be examined by the Supreme Court.

EVIDENCE.—*Action upon Bond.*—*Plea of Non Est Factum.*—*Evidence Admissible Under.*—In an action upon a bond, when a plea of *non est factum* was interposed, defendants may testify as to what was done and said at the time they signed it. The fact as to whether they did or did not execute the bond could be ascertained in no better way.

From the Warren Circuit Court.

132	387
144	297
132	387
152	522

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J. McCabe and E. F. McCabe, for appellant.

C. V. McAdams, H. H. Dochterman, and D. Simms, for appellees.

COFFEY, J.—This case is here for the third time. *State, ex rel., v. Gregory*, 88 Ind. 110; *State, ex rel., v. Gregory*, 119 Ind. 503.

It is a suit upon an administrator's bond to which, among other pleas, the appellees interposed a plea of *non est factum*.

Upon the issue formed by the plea of *non est factum* the circuit court, at the request of the appellees, instructed the jury as follows :

3. "If a paper intended to become a bond shows upon its face that several are to execute it, and the clerk understands and knows from the persons who are to sign it or who are signing it, that it is not to become a bond of one or more until all who the clerk knows are to sign it, do sign it, the clerk can not, by anything he can do to such bond or with it, make such paper a binding and valid obligation upon any who do sign it until all who such clerk knows are to sign it do sign it. Until such time there is no delivery of such bond as to any who do sign such bond."

It is contended by the appellant that the circuit court erred in giving this instruction, while on the other hand it is contended by appellees that the question of the correctness of the instruction is not presented by the record in such a manner as to authorize us to consider it, for the reason that there was no separate exception to the action of the court in giving it, and for the further reason that the giving of this instruction was not assigned as a separate reason for a new trial. In other words, it is contended by the appellees that this instruction was excepted to jointly with other instructions which are conceded to be a correct exposition of law, and that the giving of this

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instruction jointly with others was assigned as a reason for a new trial. This contention renders it necessary to examine the record so far as it relates to this branch of the case.

The instructions given by the court are brought into the record by a bill of exceptions. So much of the bill as relates to the question before is as follows: "And these were all the instructions given by the court to the jury in this cause, and to the giving of the third and fourth instructions given by the court at the request of the defendants, the plaintiff at the time excepted."

The reason assigned for a new trial is in the following language:

3. "Because the court erred in giving to the jury the third and fourth instructions asked by the defendants."

That the exception to giving the third and fourth instructions asked by the appellees is a joint exception, and that the motion for a new trial only calls in question the action of the court in giving these instructions jointly, we think, is too plain for controversy. *Brown v. Gooden*, 16 Ind. 444; *Jewett v. Honey Creek, etc.*, *Tr.*, 39 Ind. 245; *Stanford v. Davis*, 54 Ind. 45; *Washington Township v. Bonney*, 45 Ind. 77; *Silvers v. Junction R. R. Co.*, 48 Ind. 485.

The question, therefore, is presented as to whether a joint exception to the giving of instructions, assigned as a reason for a new trial, brings in review the instructions given severally or separately.

Judge Elliott, in his work entitled *Appellate Procedure*, section 791, says: "A party is not bound to object to instructions, but he is required to opportunely and appropriately except to them. It has been finally held by our court, after much wavering, that the exception must be taken to each instruction."

In the case of *Ohio, etc., R. W. Co. v. McCartney*, 121 Ind. 385, the appellant moved for a new trial on account of

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supposed error in giving an entire series of instructions, and in discussing the question as to whether this was proper practice, the court said: "Such an assignment, like a joint demurrer to separate paragraphs of a pleading, can only be maintained by showing that all the instructions are incorrect. It is an established rule that a motion for a new trial, which assigns as a cause that the court erred in giving or refusing instructions, must specify with reasonable certainty the particular instruction upon which error is predicated."

The reason given for the rule is, that as the object of motion for a new trial is to bring the attention of the court to the precise point in respect to which error is supposed to have been committed, the point must be so stated in the motion as to leave no room for reasonable doubt that the court's attention was called to it.

If a party may except jointly to two instructions, and by assigning the action of the court in giving them both as a reason for a new trial require the consideration of the instructions separately, he may do likewise as to three, four, or any given number, including a whole series. This we have seen he can not do. In our opinion the question as to whether the third instruction asked by the appellees and given by the court is not before us in such a manner as to authorize us to consider it separately. There is no objection made to the fourth instruction given in connection with the third. We are not, therefore, required to examine it with a view of discovering some error therein.

The court did not err in permitting the appellees to testify as to what was done and said at the time they signed the bond in suit. The fact as to whether they did or did not execute the bond could be ascertained in no better way.

We are not prepared to hold that there is no evidence in the record tending to support the verdict of the jury. There is some evidence from which they might have found

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for the appellees, and in such case, under the well known rules of this court, we can not disturb their verdict.

Judgment affirmed.

Filed Oct. 8, 1892.

No. 15,814.

LIKE v. COOPER.

WILL.—Construction.—Devise to Wife.—When Entitled to Statutory Interest and Special Devise.—When a husband devised to his wife “in addition to” her statutory interest in his lands, other lands “with the rents and profits for the support of herself and my minor children during her natural lifetime,” she was entitled to her legal estate in all of her husband’s lands and a life estate in the lands devised. Under section 428, Elliott’s Supp., she is not entitled to both unless it clearly appears, as it does in this instance, that it was the intention of the testator that she should have the lands devised in addition to her statutory interest.

From the Knox Circuit Court.

G. G. Reily, J. W. Emison and O. H. Cobb, for appellant.

J. W. Boyle, L. A. Meyer and B. M. Willoughby, for appellee.

ELLIOTT, J.—The appellee is the widow of Philip Cooper, deceased, and claims title to the real estate in controversy under the will of her deceased husband. The appellant asserts title to the property, and founds his claim upon a deed executed to him by George W. Cooper, a son and devisee of Philip Cooper, deceased. The question in the case arises upon the will of Philip Cooper, who is the common source of title. The contention of the appellant is that George W. Cooper took all the land described in the devise to him; that of the appellee, Mary J. Cooper, is that the appellant took the land subject to the provision in her favor and that this provision vested

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her with the ownership of one undivided third part of the land.

Item first of the will contains these provisions: "I give and devise to my beloved wife, Mary Jane, in addition to her interest in my lands, the farm on which we now reside, also my farm in said township, county and State known as the Terebaugh farm, with the rents and profits, for the support of herself and my minor children during her natural lifetime. At her death I give and bequeath to my son Elijah the 160 acres, embracing the house, also I give and bequeath to my son Clark W. the 180 acres embracing the Terebaugh farm, as above mentioned and described. I give and bequeath to my son George W. eighty acres of land adjoining the farm on which I now reside, the same on which my son James now resides and known as the Conn farm, also the west half of the north-east quarter of section twenty-three, town. two north, of range eight." Various devises to other of his children were made by the testator in substantially the same terms as those employed in the devise to George W. Cooper. The lands devised are all specifically described, but we do not deem it necessary to copy these descriptions, nor do we deem it necessary to refer to the parts of the will giving directions as to the sale of divers parcels of property,

The will recognizes the interest of the wife conferred by law, and manifests an intention to devise to her the lands and estates described in addition to that interest. The clause "in addition to her interest in my lands," occupies a conspicuous place in the instrument, and is clear and unambiguous. It is the general rule that where a devise is made to the wife, and it does not appear that it was the intention of the testator that she should take the estate cast upon her by law, and also that given by the will, she must elect which estate she will take, that given by devise or that created by law. *Hurley v. McIver*, 119 Ind. 53; *Shafer v. Shafer*, 129 Ind. 394; *Wright v. Jones*.

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105 Ind. 17; *Young v. Pickens*, 49 Ind. 23; *Wetherill v. Harris*, 67 Ind. 452. But where the language of the will clearly shows an intention to give to the wife an estate or property in addition to that given her by law, there is no necessity for an election, for she may take under the law, and take also by devise the estate or property specifically devised to her. *Shipman v. Keys*, 127 Ind. 353; *Kelly v. Stinson*, 8 Blackf. 387; *Ostrander v. Spickard*, 8 Blackf. 227; *Lewis v. Smith*, 9 N. Y. 502. The rule is thus declared by the statute of 1885: "But she shall not be entitled to both unless it plainly appear by the will to have been the intention of the testator that she should have such lands or pecuniary or other provision thus devised or bequeathed in addition to her rights in the lands of her husband." Elliott's Supp., section 428. This statutory provision is substantially a declaration of the rule recognized and enforced by the decisions of the court, so that the rule governs here, although the will of Philip Cooper may have been effective prior to the enactment of the statute. In the case of *Burkhalter v. Burkhalter*, 88 Ind. 368, the rule as we have stated it was approved and applied to a will wherein the first item gave the wife a life-estate in specific property, and the second provided that "I give and bequeath all my estate, real and personal, to my natural heirs. To my children I give to each one an equal portion after my beloved wife has taken her portion according as the law provides."

In the case referred to it was held that the specific devise to the wife was in addition to the estate vested in her by statute. In the case before us we think the intention is more plainly manifested than in the one from which we have quoted. In addition to the clause quoted from the will we have the fact that the life-estate specifically devised to the wife is burdened by the charge in favor of the minor children of the testator, and this indicates that he did not intend to cut her off with that de-

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wise. It is presumed, where there is no language requiring a different conclusion, that the testator did not mean to make "an undutiful will," that is, a will denying the rights of those naturally entitled to share in his bounty. If we adopt the appellant's construction of the will, we should be compelled to adjudge that the words "in addition to her interest in my lands" are meaningless, and that the testator intended that all his wife should receive was an estate for life in two tracts of land, and that she should receive it for the support and maintenance of the testator's children. This conclusion is one we are unwilling to adopt. It seems to us that the intention was that, first of all, the wife and mother should have her legal estate in the property unburdened with any charge, and that the son George W. should take the lands given him subject to that legal estate. It is true that the words employed in the devise to George W., if they stood alone or unqualified, are such as would carry to him the entire interest in the land, but it is clear to our minds that the other parts of the will restrict and modify the general words of that devise. It is our judgment that the testator meant that George W. should take the lands subject to the legal estate of the wife and mother, for it appears from the whole will that the testator meant to leave in his wife the legal estate created for her by the law, and that the devises to others should not operate upon that estate. The testator took care at the very outset to give, so far as it was in his power to give, to his wife her full legal estate and having done this, he thenceforth proceeded upon the theory that the estate was safe in her because not operated upon by the other devises contained in the will.

Judgment affirmed.

Filed Oct. 15, 1892.

The Louisville, New Albany, etc., Railway Co. v. Shanks, by Next Friend.

No. 14,915.

132	395
151	44
151	57

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAIL-
WAY COMPANY v. SHANKS, BY NEXT FRIEND.

INSTRUCTIONS TO JURY.—*Pleadings.—Variance.—Reversible Error.*—Where there is not such a variance between the facts alleged in a cause of action and those enumerated in an instruction as to actually mislead the adverse party, the giving of the instruction is not reversible error.

SAME.—*Refusal to Give.—When Not Error.*—A refusal to give an instruction which is not in terms correct is not error.

PARENT AND CHILD.—*Contributory Negligence.*—Parents of children of tender years must use care proportionate to known dangers, or dangers that might be known by the exercise of ordinary diligence.

INTERROGATORIES TO JURY.—*Motion to Recommit.—How Brought into the Record.—Appeal.*—A motion to recommit interrogatories to a jury for more specific answers must be brought into the record by transcription, and not by mere recitals of the clerk, or it can not be considered on appeal.

From the Jackson Circuit Court.

E. C. Field and *C. C. Matson*, for appellant.

M. F. Dunn and *G. G. Dunn*, for appellee.

ELLIOTT, J.—The plaintiff alleges, in her complaint, that the appellant is the owner of a large baggage truck, and that it is so constructed that when improperly or carelessly loaded it becomes top heavy and will easily fall over; that on the 12th day of June, 1881, the appellant loaded the truck with heavy trunks, boxes and bolts of iron; that the truck so loaded was placed at a point where it obstructed a public sidewalk of the town of Mitchell; that persons were compelled to pass the truck in order to go to and from the principal part of the town; that the truck could not be passed without taking hold of the same, as it extended entirely across the path at a place where there was "a step from the walk below up to the platform on which the truck was standing"; that the plaintiff was on the day named seven years of age, and that while passing along the sidewalk without fault or negligence on her part the truck with its load fell

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upon her; that the defendant carelessly and negligently overloaded the truck so as to render it top heavy and dangerous.

One of the positions assumed by appellant's counsel is that the trial court erred in refusing an instruction defining the issue tendered by the complaint, and in giving the following instruction:

"If you find from the evidence in this case that a truck was carelessly and heavily loaded by another company and brought to the servants of the defendant, and was by such other company placed near to or partly across a public pass-way or sidewalk, and was in that condition and situation delivered to and received by the employes of this defendant, and after they had received it and assumed control they *permitted* the same to remain in the same condition and situation, and the plaintiff passing along said street or highway by touching said truck caused the same to fall upon her and injure her, then the *defendant* is liable to the plaintiff."

The argument in support of the position assumed is that the complaint charges that the defendant loaded and placed the truck at the dangerous point, while the instruction directs the jury that there may be a recovery, although the defendant did nothing more than receive the truck after it had been loaded and placed in position, and that the effect of this instruction is to inform the jury that there may be a recovery upon a cause of action different from that stated in the complaint. We are strongly inclined to the opinion that if the defendant did receive and assume control of the truck and permitted it to remain where the corporation by which it was loaded, placed it, there was such a ratification and adoption as made the act that of the defendant. Principles of general application seem to warrant this conclusion, but it is not here necessary to decide that there was such a ratification or adoption as made the act of the first wrongdoer that of the party who assumed control of the truck and made no effort to remove the danger. It is our judgment that there is, at all events, no such variance between the facts pleaded

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as the cause of action and those enumerated in the instruction, as entitles the appellant to a reversal. The occurrence referred to by the pleadings and evidence could not have been mistaken by the appellant, neither could there be doubt that only one occurrence was referred to, nor can there be doubt as to the essential features of that one occurrence, so that the appellant could not have been misled to its actual prejudice, and it is only where a party is actually misled that this court can rightfully reverse a judgment because of an alleged variance. So the statute provides and so the authorities declare, section 391, R. S. 1881. Authorities in Elliott's Appellate Procedure, sections 610, 611, *Graves v. State*, 121 Ind. 357, and authorities stated. We do not regard the refusal of the court to give the instruction assuming to define what constitutes contributory negligence as prejudicial error for these reasons: In so far as the instruction is in terms correct it is embraced in instructions given by the court, and it is not in its terms entirely correct.

We do not deem it necessary to notice the error in the instruction refused in detail, for we deem it sufficient to direct attention to one material statement, and that is the statement which informs the jury that the care of the "parents should be in proportion to the danger to be avoided, and the fatal consequences involved in its neglect." This statement is too broad. Parents of children of tender years must use care proportioned to known dangers, or dangers that might be known by the exercise of ordinary diligence and prudence; but parents are not bound to guard their children against unknown dangers, or dangers that ordinary diligence and prudence would not make it their duty to know. The words, "and the fatal consequences involved in its neglect," adds an element to the duty of the parent which the law does not impose upon them. It is well settled that it is not error to refuse an instruction where it is not in terms correct. See authorities cited Elliott's Appellate Procedure, section 735.

The appellant asserts that the court erred in denying its

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motion to require the jury to make more definite answers to interrogatories, but there is no such motion in the record, although the clerk recites that such a motion was filed. The recitals of the clerk can not, as has been many times decided, be regarded as part of the record, but the papers or motions must be brought into the record by transcription. Under the rule declared in many analogous cases, it would seem that a motion to recommit interrogatories to a jury for more specific answers is a collateral motion, and can only be brought into the record by a bill of exceptions or special order of the court. But if it were granted that it may be brought in by the recitals of the clerk, it would not avail the appellant, for there is no such motion in the record, although the clerk recites that a written one was filed.

We can not disturb the verdict upon the evidence.

Judgment affirmed.

Filed Oct. 11, 1892.

No. 15,737.

SCHMIDT ET AL. v. PACKARD, ADMINISTRATOR, ET AL.

EVIDENCE.--*Action upon Note.—Inadmissibility of Self-Serving Declarations.*

—Where in an action on certain notes by the administrator of the payee the decedent's brother filed a cross-complaint, alleging that the notes in suit had been endorsed to himself by the deceased in his lifetime for the benefit of his sons, and claiming the ownership of the notes, declarations made by the deceased in his brother's absence, two or three years after the endorsement was made, that he had not the notes with him, but had left them with his sister, and that he had at some time had trouble with his brother, were self-serving declarations, and not admissible in evidence. So, also, were declarations made by the deceased about the time of the sale of the land in payment of which the notes were executed to him, that he intended to pay no more taxes after the sale of his land.

SAME.--*Similar Contemporaneous Acts.—Admissibility of.*—Evidence that on the same day the endorsements were made on the notes in suit similar

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endorsements were made on certain of the other notes of the deceased, and that he retained possession of these notes and collected them at or after maturity, was admissible, as it had a tendency to show that the endorsements that day made were not made with the intention of transferring the notes to his brother, but for some other purpose.

SAME.—Facts, though not in issue, which are so connected with a fact in issue as to form a part of the same transaction or subject-matter, are relevant to the fact with which they are connected; or when they are the effect of the same cause, or show the existence of a particular course of business, or the intention with which a contemporaneous act was done.

From the Whitley Circuit Court.

H. S. Biggs, for appellants.

A. C. Capron, *O. M. Packard* and *C. F. Drummond*, for appellees.

MILLER, J.—The appellee, as administrator of the estate of Charles Schmidt, brought this suit against Joel Long and wife, on two promissory notes, and for the foreclosure of a mortgage.

It was averred in the complaint that the notes and mortgage had been lost, or were wrongfully in the possession of the appellant Henry L. Schmidt, who with his co-defendants, Henry Schmidt, William Schmidt and Walter Schmidt, wrongfully and fraudulently set up an unfounded claim of ownership of the notes.

The defendants Henry L., Henry, William and Walter Schmidt, appeared to the action and filed their cross-complaint, claiming that the decedent, Charles Schmidt, in his lifetime, for a valuable consideration, endorsed the notes to said Henry L. Schmidt for the benefit of his sons, Henry, William and Walter Schmidt, and asking that the mortgage be foreclosed upon their cross-complaint.

The appellee Long, during the pendency of the action, paid the amount due upon the notes into court for the benefit of whoever might be adjudged to be the lawful holder of the same.

The cause was tried by the court and a finding and judg-

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ment rendered for the appellee, as administrator, for the full amount of the notes, and that the defendant Henry L. Schmidt, and his sons and co-defendants, had no interest in, or ownership of, the notes and mortgage in suit.

The sufficiency of the evidence to sustain the finding and judgment of the court, and certain rulings in the admission and rejection of evidence, were made the causes for which a new trial was asked. This motion was overruled, as was a subsequent motion for a new trial, on the ground of newly discovered evidence. These rulings are assigned as error in this court.

A synopsis of the evidence, so far as it is not disputed, and is deemed necessary to an understanding of the rulings of the court, is as follows :

Charles Schmidt was, during his lifetime, and prior to the 25th day of January, 1884, the owner of the real estate described in the mortgage. On that day he sold the land to the appellee Long, receiving in part payment five several promissory notes for \$1,000 each, due April 1st, 1885, 1886, 1887 and 1889, respectively. On the 22d day of March, 1884, said Schmidt went to a neighbor and caused to be written, and himself signed endorsements on the back of the two notes last maturing, being the notes in suit, as follows :

“ March 22, 1884.

“ This note is payable to H. L. Schmidt for the benefit of his sons Henry, William and Walter ; has a right to invest the same without consent of or direction of any court.

“ CHARLES SCHMIDT.”

Some time after this he removed to the city of Chicago, and resided there until his death. At the time the interest on the notes matured, in the years 1885 and 1886, the payee, in person, presented the notes to the maker and collected the annual interest on each note. On the 14th day of June, 1887, while on a visit to Kosciusko county, he was accidentally killed at a railroad crossing. At the time of his death he had an only son, aged twenty-eight years, who had lived nearly all

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his life with his mother, from whom the deceased had long been divorced. The defendant Henry L. Schmidt was the brother of the deceased, and lived in the city of Chicago. After the death of Charles Schmidt the notes and mortgage were delivered by said Henry L. Schmidt to an attorney for collection ; but, on the other hand, there was evidence from which the court may have inferred that some of the beneficiaries had been afforded an opportunity of obtaining possession of the notes after his death.

The court permitted the appellee, over the objection of appellants, to prove by Joel Long, the payor of the notes, that in January, 1887, shortly prior to the death of Charles Schmidt, the deceased was at the residence of witness in Kosciusko county when witness, not in the presence of the adverse party, asked Schmidt if he had the notes with him, stating that if he had, he, witness, would pay the interest, to which Schmidt replied that he did not have the notes with him, but had left them with his sister in Chicago.

This evidence was introduced by the administrator of Schmidt for the purpose of showing that at that time there had been no delivery of the notes to Henry L. Schmidt, but that they still remained the property of the decedent.

This evidence was of the class denounced by the law as self-serving declarations.

The general rule is that declarations by a decedent in his own favor, made in the absence of the adverse party, are incompetent when offered by his administrator. *Bristor v. Bristor*, 82 Ind. 276 ; *Brown v. Kenyon*, 108 Ind. 283. We see nothing in the evidence given that tends to take this out of the general rule, and bring it within the exceptions to the rule, where declarations may be introduced as part of the *res geste*.

The seventh cause for a new trial was predicated upon the admission of testimony of declarations by the deceased, show-

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ing that he had at some time had trouble with his brother, Henry L.

This testimony was subject to the objection above pointed out, and in addition it was objectionable on the ground of remoteness.

The eighth cause for a new trial is the admission of the testimony of William Whistler of declarations made by deceased, about the time of the sale of the land, of his intention to pay no more taxes after the sale of his land. This is subject to the same objection of being self-serving.

The court permitted the appellee to show that on the same day the endorsements were made on the notes in suit, similar endorsements were made on certain of the other notes of the deceased, and that the deceased retained possession of these notes and collected them at or after maturity. We are satisfied that the court did not err in admitting this evidence. It had a tendency to show that the endorsements that day made were not made with the intention of transferring the notes to Henry L. Schmidt, but for some other purpose.

The making of the endorsements upon the notes not in suit, although not in issue, was so connected in time, and in the language used as to indicate that they were the effect of the same cause. The retention of the notes and receipt of the money due thereon by the deceased tended to show the intention with which the endorsements were made, not only of these particular notes, but also of those in suit.

The rule is that facts, though not in issue, which are so connected with a fact in issue as to form a part of the same transaction or subject-matter, are relevant to the fact with which they are connected; or when they are the effect of the same cause, or show the existence of a particular course of business, or the intention with which a contemporaneous act was done. *Stephens Ev.* (Reynolds 2d ed.), 7; 1 *Wharton Ev.*, section 25.

Inasmuch as the conclusion at which we have arrived will

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require a retrial of the cause, we have not thought it worth while to consider the ruling upon the motion for a new trial on account of newly discovered evidence, or proper to express an opinion upon the sufficiency of the evidence to sustain the judgment.

Judgment reversed with costs.

Filed Oct. 6, 1892.

No. 16,491.

ZEIGLER, EXECUTOR, v. MIZE.

DECEDENTS' ESTATES.—Action for Widow's Statutory Allowance.—Answer of Adultery and Champerty.—Sufficiency of Answer.—Where an action is brought by a widow against the executor of her deceased husband to compel him to pay her \$500, as provided by law, out of the assets of the estate, and there is an answer in bar alleging that the plaintiff had lived separate from her husband and in adultery, but failing to allege that she had either left her husband or was living in adultery at the time of his death, and that the plaintiff had no interest in the prosecution of the claim, and was only suffering her name to be used in the interest of her counsel, who were to receive one-half of all the money recovered in her name, and that her brother, by previous arrangement, was to receive the other half, is bad. Even if she had made a champertous agreement she would not be bound by it, and might ignore it.

From the Huntington Circuit Court.

J. B. Kenner, U. S. Lesh and J. C. Branyan, for appellant.
J. T. Alexander and J. M. Hatfield, for appellee.

OLDS, J.—This proceeding was commenced by the appellee filing her petition in the Huntington Circuit Court, asking for an order against the appellant as executor of the last will of Edward Mize, deceased, to pay the appellee five hundred dollars due her as the widow of said deceased, and which sum he had refused to pay, and afterwards the appellee filed a motion asking for a like order to be made.

The appellant answered, and the appellee filed a demurrer to the answer, which was sustained and exceptions reserved, and error is assigned on this ruling and is the first alleged

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156	255
132	403
159	539

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error discussed. The answer is pleaded as a bar to the action on account of the appellee having lived separate from her husband and in adultery with another, and further that the appellee "has no interest in the prosecution of the claim, and is only suffering her name to be used in the interest of others, that is to say, that her counsel has a bargain with her to receive one-half of all that they may recover in her name, and that her brother, Samuel Sales, has a bargain with her to receive the other one-half that may be recovered in her name," and alleging that the prosecution of the suit is champertous.

The paragraph of answer is bad. The statute, section 2496, R.S. 1881 provides that "If a wife shall have left her husband, and shall be living, at the time of his death, in adultery, she shall take no part of the estate of her husband." The facts pleaded do not show that the appellee had either left her husband or that she was living in adultery at the time of his death, nor do the other facts alleged constitute a good answer. The proceedings were instituted and were prosecuted to recover the five hundred dollars given to the appellee by the statute as the widow of the deceased. This she would have a right to dispose of as she chose, and she could make a valid contract to transfer the whole or any part of the amount recovered. There is no averment that the contracts in relation to the disposition of it had any relation to the prosecution of the suit or that the attorneys representing her in the cause were to have any part of the same for their services in the prosecution of the proceedings to recover the same, or that her brother had anything whatever to do with the prosecution of such proceedings, and if she had made a champertous and void contract she would not be bound by it, and might ignore it, and such being the case we hardly see how it could be a good defence to an action she was prosecuting in her own name for a claim due her to plead that she had made a void contract for the disposition of the proceeds when collected.

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Allen v. Frazee, 85 Ind. 283; *Hart v. State, ex rel.*, 120 Ind. 83; *Stotsenburg v. Marks*, 79 Ind 193.

On proper request the court made a special finding of facts, and stated its conclusions of law. The appellant filed a motion for a new trial, which was overruled, and the ruling is assigned as error.

There was no error in this ruling. The evidence fully sustains the finding. Counsel contend that there was some evidence tending to establish a champertous contract between the appellee and her attorney and her brother. There was no question of champerty before the court in the cause.

The finding of the court was manifestly right.

Some forty years before the death of the decedent the appellee, then living in Wayne county, Indiana, charged the deceased with being the father of her bastard child, and caused his arrest; he married her, took her to the house of a relative and remained over night, occupying the same bed as husband and wife, then abandoned her and returned to his home in Huntington county. He contributed nothing to her support or to the expenses attending the birth of the child, or to the funeral expenses when it died. He was able to support her. She, driven by the force of circumstances, was compelled to make her own living; she was of weak mind; she was employed to keep house for an unmarried man, and finally lived in adultery with him for several years, until his death, which occurred several years prior to the death of Edward Mize, and during all this time no proceedings were taken by the deceased during his life to have the marital relations dissolved. It was his duty after he married her to have lived with her and supported her unless he had legal grounds for annulling the marriage or for a divorce, and if he had either he should have enforced his right in that respect, or else she is entitled to her share in his estate after his death.

There is no error in the record.

Judgment affirmed, with costs.

Filed October 6, 1892.

No. 15,902.

LOWE v. HAMILTON ET AL.

JUDGMENT.—*Assumption of Mortgage Indebtedness.*—*Sufficiency of Cross-Complaint.*—Where in a suit to foreclose the lien of certain ditch taxes, certain of the defendants appeared and filed a cross-complaint against the plaintiff and two of their co-defendants on certain notes secured by mortgage and recovered judgment by default against one of the defendants to the cross-complaint, on the ground that he had assumed to pay the mortgage indebtedness as a part of the purchase-price of the real estate, the averments in the cross-complaint that said defendant purchased the mortgaged property, agreeing to assume the indebtedness thereon as part of the purchase-price, and that he had failed to pay any part thereof, was sufficient to authorize the rendition of a personal judgment against him.

SAME.—*Default.*—*Relief Against.*—*Inadvertence and Excusable Neglect.*—*Insufficiency of Showing.*—In an action by said defendant to be relieved from said judgment, on the ground that it had been taken against him through his mistake, inadvertence and excusable neglect, the fact that the process served in the action was not distinctly read to him, and that he was told by the sheriff, and by his attorneys, that he need not appear, when he furnished no excuse for not reading the process himself, and did not show that his attorneys had been informed of the facts of the case, would not entitle him to such relief.

STATUTE OF FRAUDS.—*Oral Assumption of Mortgage Indebtedness.*—An agreement to assume the payment of a mortgage indebtedness on real estate, as part of the purchase-price thereof, is not within the statute of frauds.

From the White Circuit Court.

S. P. Thompson and R. P. Davidson, for appellant.

E. B. Sellers, for appellees.

COFFEY, J.—Prior to the April term, 1888, of the White Circuit Court, an action was commenced in that county by the State on the relation of the prosecuting attorney against a large number of persons residing in that county, to enforce against their lands the liens of certain ditch assessments.

Among the defendants to the action were the appellant and the appellees and one James H. Turpie. To that suit the appellant made default. The appellees appeared and on

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the 11th day of May, 1888, the appellee Hamilton filed an amended cross-complaint against the plaintiff in the action and against the appellant Lowe and James H. Turpie.

The cross-complaint alleged that the plaintiff in the main action claimed a lien on the land therein described for the sum of two hundred and eighty dollars and sixty-three cents, but denied that any such lien existed; that on the 7th day of December, 1882, Turpie, by his three several promissory notes of that date, promised to pay Hamilton the sum of seven hundred and fifty dollars at the times specified in said notes, being two, four and six years after the date thereof; that to secure the notes Turpie and his wife executed to Hamilton a mortgage upon the land, which mortgage was duly recorded; "that after the execution of said notes and mortgage the defendant, Hugh Lowe, purchased said real estate and as a part of the consideration for said purchase agreed to assume and to pay said notes and mortgage of the cross-complainant, and that he failed to pay any part thereof; that all said notes and mortgage were given as purchase money for said real estate by said defendants, James H. Turpie and Emma Turpie to his cross-complainant; that there is due this cross-complainant from said James H. Turpie, Emma Turpie and Hugh Lowe on account of said notes and mortgage for principal, interest and attorney fees the sum of two thousand dollars." To the cross-complaint is appended a prayer for judgment against James H. Turpie and the appellant, Lowe, for the sum of two thousand dollars and for a decree of foreclosure against all the defendants thereto.

The appellant, Lowe, being served with process to answer to this cross-complaint, failed to appear and was defaulted. Upon a hearing by the court a personal judgment was rendered against James H. Turpie and the appellant for the full amount of the notes set out in the cross-complaint, including interest and attorney's fees.

This judgment was rendered on the 20th day of February, 1889, and on the 2d day of December, 1889, this action was

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commenced. The complaint in this action consists of three paragraphs.

The first paragraph recites the commencement of the original action by the State on relation of the prosecuting attorney, giving the title of the case, including the names of all the numerous parties defendant; that on May 11, 1888, the appellant Hamilton, defendant therein, filed his cross-complaint, the default of the defendant, and the rendition of the judgment complained of, and setting out a full transcript of the proceedings in cross action by way of exhibit, as part of the complaint, and assigns as error the insufficiency of the facts to constitute a cause of action for a personal judgment against the appellant.

The second paragraph sets up the filing of the cross-complaint upon the notes and mortgage of Turpie upon the land; the averment therein that appellant had as part of the consideration for the purchase of the land agreed to pay them off; that he never was served with process, as he believed; that he was a mere nominal party to the proceeding as Hamilton well knew; that he had no cause of action against him for a personal judgment; that he gave no evidence of such right, and that he, Hamilton, knew that it was contrary to right and justice; that he knew that he had no cause of action against him, and that such personal judgment was a fraud upon him.

The third paragraph sets up, as additional matter to that in the second, that the judgment was taken against him by mistake, inadvertence and excusable neglect of the appellant; that in the original suit to foreclose the lien of certain ditch taxes he was made a party to the complaint; that he spoke to attorneys about it and was told that it was only an equity of redemption to be foreclosed; that appellant need not answer nor appear; that afterwards when the summons on defendant's cross-complaint was served it was not distinctly read, and the appellant thought it was in the same case, and had no other knowledge of any proceedings in said

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cross-action until September 16th, 1889; that the sheriff and also the attorneys informed him that it was not necessary for him to appear at all; that he made no promise to pay off any lien on the land either verbal or written. He also averred that he had been summoned in a very large number of similar cases in regard to foreclosure of liens on the lands of the Turpies; that in no other instance had there been any attempt to take a personal judgment against him; that he had a valid and meritorious defence, etc.

The second and third paragraphs of the complaint are verified.

The court sustained a demurrer to each paragraph of the complaint, and this ruling is assigned as error here.

The first paragraph of the complaint is a complaint to review the judgment rendered against the appellant upon the alleged ground that the cross-complaint does not state facts sufficient to authorize a personal judgment against him. It is objected that it does not appear when the contract by which the appellant assumed to pay the notes and mortgage in suit was made, with whom it was made, what its terms were, what the consideration was, whether the contract was by parol or in writing, and, if oral, how it was taken out of the statute of frauds. These objections go to the question of the certainty of the allegations in the cross-complaint. It does appear that the notes and mortgage set out with the cross-complaint were executed by Turpie in consideration of the purchase-money for the land therein described. The plain inference from the allegations of the cross-complaint is, that the appellant purchased the land therein described from Turpie, since it appears that Turpie was its owner; that he agreed at the time of such purchase, as part of the purchase-price, to pay the mortgage held by the appellee, Hamilton. It not being alleged that the contract was in writing the legal presumption is that it was oral, but such an agreement is not within the statute of frauds. *Snyder v. Robinson*, 35 Ind. 311; *McDill v. Gunn*, 43 Ind. 315; *Waterman v. Morgan*,

114 Ind. 237; *Fleming v. Easter*, 60 Ind. 399; *Henderson v. McDonald*, 84 Ind. 149; *Rhodes v. Mathews*, 67 Ind. 131.

It is probably true that the cross-complaint is subject to a motion to make it more specific, but such defects can not be reached by demurrer nor by an application to review. In our opinion the cross-complaint states facts sufficient to authorize a personal judgment against the appellant, and this being true, the court did not err in sustaining a demurrer to the first paragraph of the complaint.

The second and third paragraphs of the complaint seem to be based upon the provisions of section 396, R. S. 1881, which provides that a party shall be relieved from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect. The question, therefore, is presented as to whether either one of these paragraphs states facts sufficient to entitle the appellant to this relief.

The allegation or statement of the appellant in the second paragraph of the complaint, to the effect that he does not believe he was served with process on the cross-complaint, is modified by the further statement of the appellant, to the effect that he has no recollection of being so served.

In the third paragraph he admits that he was served with process, but gives as a reason for his neglect to defend that the process was not distinctly read. He gives no excuse for not reading the summons himself, nor for not requiring it to be read more distinctly. He had no right to rely upon the statement of the sheriff as to the nature of the suit against him, since the sheriff is not presumed to possess knowledge upon that subject beyond that disclosed by his writ.

It is true he states that he was advised by his attorneys that no personal judgment could be taken against him, but he does not show that he made any statement of the facts to his attorneys, or that they had any knowledge of the contents of the cross-complaint. If his attorneys did have knowledge of the contents of this pleading, and with such knowledge advised him that no personal judgment could be

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taken against him, this would not be the kind of mistake contemplated by the statute under immediate consideration.

If a judgment were to be set aside on every occasion when the attorney of one of the parties to a suit should make a mistake in a science so intricate as that of the law, there would be little stability in judgments.

In our opinion neither the second nor third paragraph of the complaint states facts sufficient to authorize us to relieve the appellant from the personal judgment of which he complains. As bearing upon the question here discussed, see *Bristor v. Galvin*, 62 Ind. 352; *Jonsson v. Lindstrom*, 114 Ind. 152; *Williams v. Grooms*, 122 Ind. 391.

Judgment affirmed.

Filed Oct. 14, 1892.

No. 15,414.

PARKS v. SATTERTHWAITE, ADMINISTRATOR.

TRUST AND TRUSTEE.—Special Finding.—Fraud.—Recovery.—In an action against a trustee's administrator for a conversion of money by the decedent, where there is a special finding of the court, but such special finding does not show that there was any actual fraud on the part of the trustee, the case must be treated as one into which no element of fraud enters. Where fraud is essential to a recovery, it must be found as an ultimate or inferential fact.

SAME.—Statute of Limitations.—Exceptions to.—The rule that the statute of limitations is a bar to suits in equity as well as actions at law has its exceptions in direct trusts, and technical and continuing trusts, which are creatures of, and fall within the exclusive jurisdiction of chancery.

SAME.—Statute of Limitations.—Declarations.—Estoppel.—Mere declarations of the trustee that he had so arranged matters that appellant would get his money will not, in the absence of fraud, operate by way of estoppel to preclude the appellee from setting up the statute of limitations.

SPECIAL FINDINGS.—Must State Facts not Evidence.—In a special finding, mere statements of matter of evidence are out of place and can not be considered in this court. It is the duty of the trial court to determine what the evidence proves and state its judgment or conclusions as to the fact.

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STATUTE OF LIMITATIONS.—Continuing Trust.—Demand.—When Necessary.—

The statute of limitations does not run until a cause of action accrues, and where there is a continuing trust, or where the contract is a continuing one and of such a character as to make a demand necessary to a complete cause of action, the statute does not begin to run until a demand has been made.

From the Huntington Circuit Court.

O. W. Whitelock and S. E. Cook, for appellant.

H. B. Sayler, S. M. Sayler and J. M. Sayler, for appellee.

ELLIOTT, J.—In the year 1865 the county of Huntington offered a bounty of five hundred dollars to each person who would enlist in the military service of the United States. This offer was accepted by the appellant, and he entered the service. At the time of his enlistment he was under the age of twenty-one years. Shortly after his enlistment his father, Joseph Parks, since deceased, collected the bounty without his knowledge or consent. The deceased admitted to divers persons the collection of the money, and stated that he was keeping it for his son, and at one time (the date does not appear) declared, in response to a request from the appellant, that he had arranged it so that the appellant would get the money. This suit was not brought until more than fifteen years after the receipt of the money by the father, and was not brought until after the father's death. The facts we have outlined are embodied in a special finding.

As there is no finding that the appellee's intestate was guilty of actual fraud, we must treat the case as one into which no element of that kind enters, for it is well settled that where fraud is essential to a recovery it must be found as an ultimate or inferential fact. See authorities cited in Elliott's Appellate Procedure, section 787, note 2. The case before us does not come within the rule that suits against a trustee are not necessarily barred where the person charged as trustee was guilty of fraud. We fully recognize the rule that even in cases of constructive or implied trusts the statute will not bar a suit where there is fraud, but we can

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not assume that there was fraud on the part of Joseph Parks. *Piatt v. Vattier*, 1 McLean, 146; *Piatt v. Vattier*, 9 Pet. 405; *Juzan v. Toulmin*, 9 Ala. 662.

The appellee's intestate undoubtedly received and held the money under such circumstances as entitled the appellant to treat him as a trustee. If the suit had been brought in due time, there would have been no question as to the appellant's right to recover as the beneficiary of an implied or constructive trust. The question, however, in the actual case is not as to the abstract right of recovery, but as to the effect of the statute of limitations upon the right to maintain a suit. If the case is to be regarded as the ordinary one of a trust imposed by law, there can be no escape from the conclusion that the statute operates as a bar. The case falls fully within the doctrine thus stated in *Raymond v. Simonson*, 4 Blackf. 77: "The general rule, however, that the statute of limitations is a bar to suits in equity, as well as actions at law, has its limits. It is opposed by another general rule, that in cases of frauds and trusts, the statute of limitations does not run. The trusts coming within this rule are direct trusts, technical and continuing trusts, which are not cognizable at law, but which are mere creatures of a court of equity, and fall within the proper and exclusive jurisdiction of chancery. There are numerous eventual and possible trusts, that are raised by law and otherwise, and that fall within the control of the statute. Every deposit is a trust; every person who holds money to be paid to another, or to be applied to a particular and specific purpose, is a trustee, and may be sued either at law or in equity." If the trust imposed upon Joseph Parks must be regarded as an ordinary trust imposed by law, then it is within the statute, inasmuch as the trust is not one of exclusive equity cognizance, and such a trust is not a continuing one. If the trust was completed when the money was received, then a cause of action enforceable at law arose, for the appellant might have sued upon an implied contract or for money had and received.

It is well settled that in such case the statute prevails. *Smith v. Calloway*, 7 Blackf. 86 (88); *Newsom v. Board, etc.*, 103 Ind. 526, and authorities cited; *Stone v. Brown*, 116 Ind. 78 (80); *Godden v. Kimmell*, 99 U. S. 201; *Johnston v. Smith*, 27 Mo. 591. Where, however, there is a continuing trust or obligation the rule does not, as we shall presently show, operate in full force or vigor.

We agree with counsel that there may be cases where the person charged as a trustee may be estopped from availing himself of the statute, but we can not hold that the appellee is estopped from setting up that defence. There is no finding that there was any fraudulent concealment of the receipt of the money, nor any fraudulent attempt to prevent the appellant from ascertaining and enforcing his rights. We can not agree with appellant's counsel that the assurance of the deceased that he had so arranged the matter that the appellant would get his money operates, by way of estoppel, to preclude the appellee from setting up the defence of the statute, since there is no finding that there was a fraudulent act or fraudulent intent.

The statement in the special finding that the appellee's intestate declared to third persons that he was keeping the money for his son is the statement of a matter of evidence, and is not the statement of a fact. As we have already impliedly said, the statements of mere matters of evidence are out of place in a special finding, for it is the duty of the trial court to determine what the evidence proves and state its judgment or conclusion as the fact. In this instance, if the court had concluded that the evidence proved that Joseph Parks was keeping the money for the appellant, it was its duty to have so stated its conclusion, and not, as it did, merely report the evidence in the special finding. Evidence and facts are essentially different things. We can not, under the well settled rule, do otherwise than eliminate the statements of the evidence from the facts stated by the court.

The difficult question in the case is as to whether the facts

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stated, excluding mere evidence, show that the deceased agreed with his son to keep the money for him. If he did so agree, then we think it quite clear that it must be adjudged that the right of action is not shown to be barred. Where one receives the money of another to keep for him—takes it, in other words, as a continuing trust—the statute does not run until there is a disavowal of the trust or a refusal to perform upon proper demand. If, for illustration, a son is about to enter the army, and the father receives or collects money under an agreement to keep it for him, the statute does not begin to run until there has been a breach or a disavowal of the trust. This is the doctrine of many closely analogous cases. *Sawyer v. Tappan*, 14 N. H. 352; *Rusling v. Rusling*, 42 N. J. Eq. 594; *Zuck v. Culp*, 59 Cal 142; *Cross v. Eureka, etc., Co.*, 73 Cal. 302.

The doctrine is substantially the same at law as in equity. *Morse Banking*, section 322; *Payne v. Gardiner*, 24 N. Y. 146; *Smiley v. Fry*, 100 N. Y. 262; *Finkbone's Appeal*, 86 Pa. St. 368. The statute does not begin to run until the cause of action accrues, and where there is a continuing trust, or where the contract is a continuing one, and of such a character as to make a demand necessary to a complete cause of action, the statute does not begin to run until demand has been made. *Pressley v. Davis*, 7 Richardson Eq. 105 (62 Am. Dec. 396). It is true that there are cases where the demand must be made within the period fixed by statute. *Newsom v. Board, etc., supra*, and cases cited. But it is also true that there are cases where a very different rule applies. Such a case, for instance, is that of a continuing trust, or of a contract to keep for another money of which he makes a deposit. *Girard Bank v. Bank*, 39 Pa. St. 92; *Wilson v. Brookshire*, 126 Ind. 497. No general rule can be laid down that will fit all cases, since there are cases where justice requires that a demand should be made within the statutory period, while in others the nature of the contract and the situation of the parties requires that it be adjudged that the trust or obliga-

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tion is a continuing one, which is not violated or broken until there is a refusal to honor a demand, and that until then the statute does not begin to run. *Daugherty v. Wheeler*, 125 Ind. 421 (426). But while we believe the law would be with the appellant if the assumption of counsel that there was a direct and continuing trust could be made good, we are compelled to hold that, upon the facts stated in the special finding, the assumption is unsupported, and that there is no express or direct continuing trust or obligation shown. The utmost that can be said is that there was a trust cast upon the appellee's intestate, and that by subsequent acts and declarations he acknowledged the trust. We have endeavored in vain to find facts which will justify us in holding that there was such a continuing direct trust or obligation as postponed the running of the statute until after a demand and a refusal or disavowal.

If there had been a motion for a *venire de novo* properly followed up, we should have quite a different case, but we have only the exceptions to the conclusions of law.

Judgment affirmed.

Filed October 14, 1892.

No. 15,792.

REID ET AL. v. JOHNSON.

MECHANIC'S LIEN.—*Agreement not to File Notice.*—*Violation of.*—*Cross-Complaint.*—*Nominal Damages.*—*Sustaining Demurrer.*—*Harmless Error.*—In an action against a contractor, who had purchased the material, and the owner of the property, to enforce a mechanic's lien and recover the amount of the claim, the contractor filed a cross-complaint claiming damages for a breach of contract on the part of the plaintiff in filing the notice of mechanic's lien. The cross-complaint does not state in what manner or to what extent the contractor was injured. There was a prayer for \$500 damages. To this cross-complaint a demurrer was sustained.

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Held, that as there was no averment that the contractor was damaged in any sum, the prayer for damages could not supply such deficiency.

Held, also, that if the cross-complaint was good, the sustaining of the demurrer thereto would not amount to reversible error, since if any damages were recoverable under the cross-complaint they would only be nominal, and a wrong ruling is only available error when it does harm to the substantial rights of the complaining party.

From the Marion Superior Court.

J. F. Carson and *C. N. Thompson*, for appellants.

W. N. Harding and *A. R. Hovey*, for appellee.

McBRIDE, C. J.—The appellant was a contractor, employed by George W. and Jane G. Bender to erect a dwelling-house upon land belonging to them. He purchased material of one John B. Emerson, who took the necessary steps to secure a lien for the same on the property. Emerson became insolvent, and the claim passed into the hands of a receiver, who sold it under order of court to the appellee.

This suit was by her to recover the amount of the claim and foreclose the lien. The principal controversy in this court arises on the action of the trial court in sustaining a demurrer to a paragraph of cross-complaint filed by the appellant. The pleading in question alleges: "That heretofore, to wit, on the — day of —, 1886, the said defendant contracted to erect and complete a dwelling-house for his co-defendant, George W. Bender, on the property described in the complaint herein,—being a contractor. And this defendant says that one John B. Emerson, a dealer in lumber, offered to furnish estimates for the lumber necessary to be used in the construction of said house. And the cross-complainant says that it was agreed, by and between said Emerson and this defendant, that said Emerson would furnish the lumber necessary for the construction of said house, upon agreed prices. And it was also stipulated, as a part of said agreement between said cross-complainant Reid and said Emerson, that said Emerson would not file any notice

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of a mechanic's lien on said property for any lumber furnished by said Emerson, which notice, if filed, would affect the standing and credit of defendant Reid as a contractor. That said Emerson consented to said stipulation, and agreed, in consideration of defendant Reid purchasing said lumber of said Emerson, not to file any notice of a mechanic's lien therefor. And defendant Reid says he performed all the conditions of said agreement on his part to be performed, but says that said Emerson, in violation of his said contract, did file such notice of a mechanic's lien, to the injury and damage of this defendant's credit and standing as a contractor. And defendant Reid says that plaintiff, Mary L. Johnson, is the purchaser of the claim in suit, being a claim for said lumber, at a sale held by the assignee of said Emerson under order of the proper court; that said John B. Emerson is now wholly insolvent; that the amount of damages due defendant Reid, by reason of the breach of the contract herein referred to, should be set off as against the claim of the plaintiff herein." Wherefore, etc.

The paragraph concludes with a prayer for a judgment for \$500, and that the same be set off against any judgment rendered in plaintiff's favor on the claim.

The theory of this paragraph is that the appellant is entitled to recoup damages for Emerson's violation of his agreement to waive his right to a lien.

It is clear that if any damages are recoverable at all under the averments of this paragraph of cross-complaint, the recovery would be limited to nominal damages. No special damages are averred. It does not appear wherein, in what manner, or to what extent, the appellant was injured, either in his character or in his standing as a contractor. There is no averment that he was damaged in any sum. The prayer for a judgment for \$500 can not supply the place of such an averment. It is not a case where the damages can be computed or in any way ascertained from the facts pleaded.

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Whether damages are recoverable at all for a breach of such a contract we need not decide. Assuming that damages are recoverable, and that the paragraph in question is sufficient for the recovery of nominal damages, the error in sustaining the demurrer to it will not justify a reversal. A wrong ruling is only available as error when it does harm in a material degree to the substantial rights of the complaining party. Elliott's App. Proc., section 636.

When the averments of a pleading are such as to authorize the recovery of nominal damages and no more, and do not in any way involve the establishment or vindication of any substantial right it is not available error to sustain a demurrer to it.

The only additional question discussed arises on the court's action in overruling a motion for a new trial. The question is not properly in the record. We have, however, examined it, and are of the opinion that the court did not err as the appellant contends.

Judgment affirmed.

Filed Oct. 15, 1892.

No. 16,731.

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PARKER, CLERK, ET AL. v. THE STATE, EX REL. POWELL.

APPORTIONMENT ACT.—Fictitious Suit.—Collusion.—Motion to Dismiss.—An action was brought questioning the validity of two acts of the Legislature and to enjoin the officers of the county from acting under them, and to compel them to proceed under an earlier act of the Legislature relating to the same subject.

Held, that the action was properly brought against the officers named, and the fact that such officers, relator, and attorneys all entertain the same opinion of the laws in question, or are otherwise agreed, is immaterial. **Held**, also, that when the Attorney General moved to dismiss the appeal on the ground that the suit was fictitious and collusive, and all the parties to the original litigation file affidavits and answers denying collu-

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sion, and asserting that the controversy is real, and there is nothing in the record or in the showing made by the Attorney General sufficient to authorize a dismissal, the motion could not be entertained.

PRACTICE.—Admitting New Parties.—When it is shown that the determination of a cause may seriously affect the rights of those not parties, it is proper, on a sufficient showing, to permit them to intervene and present their side of the controversy.

SAME.—Action Affecting the Public.—Calling in Attorney General.—When the adjudication sought is such as will affect the general public, it is the duty of the court to take such additional steps as may be necessary to a full presentation of the questions involved, as, for example, calling in the Attorney General.

CONSTITUTIONAL LAW.—Motives of Legislature.—In a proper case, the court can determine whether a statute is constitutional or unconstitutional, but it can not judge as to the motives of the Legislature in its enactment.

APPEALS.—Filing Transcripts.—Order of.—Advancement.—Appeals must be docketed and heard in the order in which the transcripts are filed, but the court may, in cases involving important public interests, direct otherwise and advance the hearing of the cause, but a party is not entitled to such advancement as a matter of right.

From the Henry Circuit Court.

J. H. Mellett and *W. E. Niblack*, for appellants.

A. W. Wishard, *M. E. Forkner*, *F. Winter*, and *J. B. Elam*, for appellee.

McBRIDE, C. J.—The Attorney General moves to dismiss this appeal, on the ground that the suit is fictitious and collusive. All the parties to the original litigation have filed affidavits and answers, resisting the motion, denying collusion and asserting that the controversy is real. The appellee also files a motion to strike out the motion of the Attorney General to dismiss, and to vacate the order permitting his appearance.

We find nothing in the record, or in the showing made by the Attorney General, sufficient to authorize a dismissal. The complaint questions the validity of two acts of the Legislature, seeks to enjoin the officers of the county from acting under them, and to compel them to proceed under

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an earlier act of the Legislature relating to the same subject.

The relator shows such interest as entitles him to invoke the aid of the court. It is also apparent that he is sincere in his contention, while the affidavits of all the parties deny collusion.

The action is properly brought against the officers named. The facts that such officers, the relator and attorneys all entertain the same opinion of the laws in question, or are otherwise agreed, is wholly immaterial. The officers named are sued as such, and not as individuals. The relator in such cases can not be required to forego the right of appealing to the court, simply because the officer against whom he must necessarily proceed agrees with him politically or otherwise. It is also not material at whose suggestion or expense the suit was instituted or carried on.

Courts can not refuse to entertain and decide controversies because the motives of the parties and promoters may be self-serving.

When it is shown that the determination of a cause may seriously affect the rights of those not parties, it is proper, on a sufficient showing, to permit them to intervene and present their side of the controversy, as the court has here done. It is also the duty of the court, when the adjudication sought will seriously affect the general public, to take such additional steps as may be necessary to a full presentation of the questions involved; hence, the appearance of the Attorney General,—which is not intrusive as is contended, but is by suggestion of the court. The law makes it his duty to attend to the interests of the State in all suits in which the State is interested in this court. Section 5666, R. S. 1881.

While the State, as a body politic, is not a party to the original litigation, save as the relator is permitted to use its name, still, the judgment invoked would directly affect

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each and all of the citizens of the State, individually and collectively. While not within the letter, it is certainly so far within the spirit of the statute that we feel justified in permitting his appearance as the representative of the people, who, in the aggregate, constitute the State. In so doing the court feels justified in assuming that his appearance will be only as an officer, acting under the sanction of his official obligation; and that he will take only such steps as may, in his judgment, tend to aid the court in reaching a just determination of the cause. True, in his motion to dismiss the appeal appears language relating to the circuit judge who tried the cause, which can have no significance save as a reflection upon the integrity of that officer. We assume that this language was used without sufficient deliberation. There is nothing whatever in the record to justify it. As a judge he was compelled to, and did discharge a duty which the law imposed upon him. As we have said, we assume that the use of this language was merely the result of insufficient deliberation, and we direct that it be struck out. Many other matters, appearing in this motion, as well as in the several other motions and papers filed by the parties, being of a purely personal character, and not tending to aid the court in its investigation, must be disregarded. So also of allegations concerning the motives of the Legislature in the enactment of the law in question.

We assume that the only question presented by the record for our consideration is, are the several acts of the Legislature in question valid statutory enactments? And we now direct that all steps heretofore taken, all papers filed, and all arguments, oral or otherwise be directed, and strictly confined to that single inquiry. The court can, in a proper case, determine whether a given statute is constitutional or unconstitutional, but it can not sit in judgment upon the motives of the Legislature in its enactment. Cooley on Constitutional Limitations, 222.

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Nor can it, so far as anything as yet appears from the record before us, pass judgment upon the motives of any of the parties to this litigation or of counsel in the case. We can not tolerate any digression, or the bringing in of immaterial or collateral issues, which can only serve to stir up strife and obscure the main inquiry; and all such matters contained in the several papers filed are ordered to be struck out. The court will take such steps as will insure a full and fair presentation of every question legitimately involved; but in view of certain suggestions made relative to the filing of answers, etc., will remind counsel that this court can not be converted into a *nisi prius* tribunal. *Board, etc., v. Newman*, 35 Ind. 10.

The appellee moves for the advancement of the cause, and for such action as will permit the court to decide it, prior to the next general election, nowless than a month distant.

The advancement of a cause can never be claimed as a right. The statute, section 653, R. S. 1881, provides that appeals shall be docketed in the order in which transcripts are filed and shall be heard in the same order, unless the court, for good cause shown, direct otherwise. This invests the court with a discretionary power of changing the order. The practice under this statute has been to advance certain classes of cases; generally, only those involving important public interests. Elliott's Appellate Procedure, section 463. The character of this case, and of the questions involved, are clearly such as bring it within the rule of practice long followed, and it should be advanced.

Exercising the discretion vested in us by the law, however, we can not feel that we will be justified in hastening our decision as asked.

It is, therefore, ordered that the cause be advanced; and that it be set down for oral argument on the 17th day of November, 1892, at 9:30 o'clock A. M. It is further

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ordered that all briefs be filed on or before November 14th, and that counsel be required to exchange briefs, and to furnish points for oral argument as required by the rules of this court.

Filed Oct. 12, 1892.

No. 15,895.

THE NATIONAL BANK OF BATTLE CREEK, MICHIGAN, v. LOCK.

BILL OF EXCEPTIONS.—*Averments in Evidence.*—A statement in a bill of exceptions that certain testimony was offered in evidence does not make the testimony a part of the record, and is not equivalent to the averment that such testimony was given.

JUDGMENT.—*Defendant Entitled to on General Denial.*—Where there was no evidence introduced entitling the plaintiff to recover, the defendant is entitled to a finding and judgment on the issue joined by his answer in general denial, and it matters not whether the evidence supports his affirmative answers or not.

From the Jasper Circuit Court.

S. P. Thompson, for appellant.

E. P. Hammond, *W. B. Austin* and *A. H. Hopkins*, for appellee.

OLDS, J.—This is an action brought by the appellant upon a note executed by the appellee to Nichols, Shepard & Company for \$300.00 dated July 1st, 1888, due on or before December 25, 1888, payable at the Exchange Bank in Remington, Ind., and for foreclosure of a chattel mortgage securing the same, alleging a sale and transfer of the note by the payee to the appellant by indorsement. The note was given for machinery. Issues were joined by an answer in general denial, and by affirmative answers, raising questions as to breach of contract in the sale, and

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alleging defects in the machinery. There was a trial and finding and judgment for the appellee.

A motion for new trial was filed by the appellant and overruled, and exceptions reserved. The discussion of counsel for the appellant relates to the sufficiency of the evidence to support the affirmative answers of the appellee. The point is made by counsel for the appellee that there was no evidence introduced by the appellant, entitling it to a judgment; that the record does not show that either the note, mortgage or indorsement, or assignment of either, was put in evidence, and the point seems to be well taken. The record shows that the appellant offered in evidence the note sued upon, and that it also offered in evidence the mortgage and a separate written assignment of the mortgage and note, but the record does not show that either was admitted or introduced in evidence. The record is silent as to whether they or either were admitted or received in evidence, or whether they were ruled out and excluded by the court. The record simply shows that such instruments in writing were offered in evidence. The complaint alleges a transfer of the note by the payee to the appellant by indorsement. No indorsement is even offered in evidence. There is a material difference between offering, and the introduction of evidence. The record must show what evidence was admitted, thereby showing upon what evidence the cause was tried.

The record not showing that any evidence was introduced, entitling the appellant to a finding and judgment, the appellee was entitled to a finding and judgment on the issue joined by his answer of general denial, and it is immaterial whether the evidence supported his affirmative answers or not. *Fellenzer v. Van Valzah*, 95 Ind. 128. In *Peck v. Louisville, etc., R. W. Co.*, 101 Ind. 366, it is held that "A statement in a bill of exceptions that certain testimony was offered does not make that testimony a part of the record, and is not equivalent to the statement

The Board of Commissioners of Wells County *et al.* v. Fahlor.

that such testimony was given ; " and this is all the record shows in this case. To the same effect is the decision in *Lyon v. Davis*, 111 Ind. 384.

There is no error in the record.

Judgment affirmed with costs.

Filed Oct. 13, 1892.

No. 13,050.

132 426
184 08437

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. FAHLOR.

HIGHWAYS.—*Establishment of.—Special Assessment.—Notice.*—In proceedings to establish a public road, where an adjacent owner's land is sought to be subjected to a special assessment, notice is essential to confer jurisdiction.

JUDICIAL PROCEEDINGS.—*Void.—Validating Statute Invalid.*—Where judicial proceedings are void because of an entire absence of notice to a property owner, a subsequent statute assuming to validate such proceedings is invalid.

From the Wells Circuit Court.

J. S. Daily, L. Mock, L. B. Simmons, E. R. Wilson and J. J. Todd, for appellants.

N. Burwell, for appellee.

ELLIOTT, J.—This case is in this court for the second time. *Fahlor v. Board, etc.*, 101 Ind. 167. A branch of the subject-matter of this controversy, exhibiting some of the facts and questions contained in the record now before us was considered in *Johnson v. Board, etc.*, 107 Ind. 15. The cases to which we have referred lay down two leading rules which govern this case.

First. Notice is essential to confer jurisdiction in proceedings for the establishment of a public road, where an

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adjacent owner's land is sought to be subjected to a special assessment.

Second. Where judicial proceedings are void because of an entire absence of notice to a property owner, a subsequent statute assuming to validate such proceedings is invalid.

Judgment affirmed.

Filed October 12, 1892.

No. 16,612.

McCOLLOUGH v. THE STATE.

132	427
147	43
132	427
164	236

CRIMINAL LAWS.—*Larceny.*—*Burglary.*—*Misjoinder of Counts.*—The joinder of counts for larceny and obtaining the same goods by burglary is expressly authorized by section 1748, R. S. 1881, and it is not necessary that it should affirmatively appear in either count of the indictment that the goods mentioned in each are identical. It is sufficient when the contrary does not appear.

SAME.—*Compelling Prosecuting Attorney to Elect.*—*Discretionary with the Court.*—The power of compelling the prosecuting attorney to elect upon which count he will proceed is discretionary with the court, and will not be disturbed unless there is an abuse of discretion.

SAME.—*Finding and Judgment Contrary to Evidence and Beyond Charge.*—*Misprision of Judge.*—*Presumption as to.*—Where the finding and judgment of the court were that the defendant "is guilty of burglary and grand larceny," and the indictment only charged burglary and petit larceny, it can not be assumed, as against the repeated statement in the record that it was a mere clerical error, and the finding of guilty of grand larceny being beyond the charge in the indictment and not supported by the evidence, and the punishment not being in accordance with that laid down for burglary, the judgment must be reversed.

From the Jackson Circuit Court.

R. Applewhite and *J. F. Applewhite*, for appellant.

A. G. Smith, Attorney General, and *W. T. Branaman*, Prosecuting Attorney, for the State.

MILLER, J.—This was a prosecution based upon an in-

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dictment containing two counts, one for petit larceny and the other for burglary.

In the first count it is charged that the appellant, with others, did on the 24th day of March, 1892, "feloniously, take, steal and carry away one hundred and seventy pounds of meat of the value of thirteen dollars, and then and there the personal goods and property of Charles White."

In the second count the same persons are charged with breaking into the smoke-house of Charles White, on the night of March 24, 1892, with intent to burglariously steal, take and carry away the "personal goods and property of Charles White, then and there situate in said smoke-house."

The appellant's motion to quash the indictment was overruled, and this ruling is complained of in this court.

The only objection urged to the indictment is the joinder of the counts for larceny and burglary in the same indictment.

Duplicity for which an indictment or information will be quashed is the joinder of separate and distinct offences in one and the same count. *Knopf v. State*, 84 Ind. 316; *State v. Weil*, 89 Ind. 286; *Siebert v. State*, 95 Ind. 471; *Stewart v. State*, 111 Ind. 554; *Kiley v. State*, 120 Ind. 65.

The joinder of counts for larceny and obtaining the same goods by burglary is expressly authorized by section 1748, R. S. 1881. In our opinion it is not necessary that it should affirmatively appear in the indictment, or either count thereof, that the goods obtained by the burglary are the same goods mentioned as being the subject of the larceny. It is sufficient, when the indictment is assailed, that the contrary does not affirmatively appear.

We are also of the opinion that the court did not err in refusing to compel the prosecuting attorney to elect upon which count of the indictment he would proceed.

This was a matter largely within the discretion of the

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trial court, and we can not say that this discretion was abused. *Glover v. State*, 109 Ind. 391, and cases cited.

The cause was submitted to the court for trial, and a finding and judgment entered of guilty of burglary and grand larceny, and the appellant was sentenced to make his fine to the State in the sum of ten dollars, and be imprisoned in the State prison for three years, and disfranchised for a like period of time.

The appellant insists that the court erred in finding and adjudging him guilty of both burglary and larceny; and that it also erred in finding him guilty of grand larceny, when he was indicted for petit larceny.

The finding of the court is that the defendant "is guilty of burglary and grand larceny, as charged in the indictment."

The judgment is that the defendant "is guilty of burglary and grand larceny."

That the court should not have entered a finding and judgment for grand larceny upon an indictment for petit larceny is too clear for argument or the citation of authorities.

It may be that the substitution of the word "grand" in place of "petit" was a clerical misprision, but we can not assume, as against the repeated statement in the record, that such was the fact.

Not only was the finding that he was guilty of grand larceny beyond the charge made by the indictment, but it was not supported by the evidence. The only evidence given of the value of the meat, which was the subject of the larceny, is in the testimony of Charles White, the prosecuting witness, who fixed its value at \$20.

The penalty fixed by the court in its finding and judgment was such as might have been awarded for either grade of larceny, but not of burglary, a fine being no part of the punishment for that offence, section 1919, R. S. 1881. The term for which the appellant was sentenced, being the

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extreme period allowed for petit larceny we are unable to say that the court intended the punishment for that grade of crime, and that it was no greater than it would have been if the conviction had been for petit larceny. The presumption is that the punishment was in accordance with the grade of crime, of which the court found him guilty and, therefore, greater than it would have been if the appellant had been convicted of petit larceny.

The judgment is reversed, with instructions to grant the appellant a new trial.

Filed Oct. 13, 1892.

No. 15,392.

THE WABASH AND WESTERN RAILWAY COMPANY v.
MORGAN.

RAILROAD.—*Personal Injuries.—Defective Engine.—Sufficiency of Complaint.*—

In an action against a railroad company by an employee to recover damages for injuries alleged to have been sustained while coupling cars it was averred that the engine used was defective, and could not be handled or controlled so as to be safe for those engaged in coupling and uncoupling the cars which were propelled by it, such difficulty in handling and managing being in part caused by the leaking of the throttle, and in part by defects unknown to plaintiff, and which he is unable to more particularly describe or specify, and that said defects combined were such that when said engine was reversed and caused to move backward it would often give a sudden spring or start, and would move with a sudden rush or spring. It was also alleged that the defendant knowingly employed an incompetent engineer to operate said engine. It was further alleged that the defendant had long known of the dangerous and defective condition of the engine.

Held, that a motion to make the complaint more specific in that the plaintiff should be required to state the length of time the engine had been defective, and the length of time the engineer had been negligent, the exact defects in the engine, the particulars which constituted the alleged incompetency of the engineer, etc., was properly overruled.

SAME.—Interrogatory to Jury.—Notice of Defect.—It was proper for the plaintiff to submit an interrogatory to the jury, asking if the foreman of the shop of the defendant, at the place where the accident occurred, was

132	430
138	39
132	430
140	654
143	573
132	430
147	270
132	430
152	25
152	26
132	430
154	164
132	430
160	326
132	430
161	683
161	687
132	430
166	299
167	245
168	475

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not notified before the accident by an engineer of the defective engine, that it was in an unsafe and unfit condition, and liable to be wrecked unless it was taken into the shops and repaired.

SAME.—Measure of Damages.—What Considered in Estimating.—In estimating the damages in such an action, it was proper to inform the jury that they should be ascertained on the basis of compensation, and that in making such estimate the jury should take into consideration the plaintiff's physical and mental suffering, the character of the injury, whether temporary or permanent, and the reduction, if any, in plaintiff's ability to earn money caused by the injury.

SAME.—Master and Servant.—Safe Machinery.—Master's Obligation to Furnish.—While the master is not bound to use the highest care, nor to use the latest or most improved machinery, he is bound to use care, skill, and prudence in selecting and maintaining machinery and appliances, and for a negligent omission of this duty he is answerable to a servant injured by the omission.

SAME.—Instruction to Jury.—Notice of Defect.—How May be Inferred.—An instruction to the jury as to notice on the part of the defendant of the defective engine, that they might find such notice to be proved, if it might be rightfully and reasonably inferred from the evidence given in the cause, although there might be no direct testimony as to such notice, was proper, in view of the averment in the complaint that the defendant had long known of the dangerous and defective condition of the engine.

SAME.—Instruction to Jury.—Incompetence of Engineer.—An instruction was properly refused which made the plaintiff's right of recovery dependent upon the incompetence of the engineer, and the defendant's knowledge of such incompetence, as under the allegations of his complaint he might have recovered by reason of the defects in the engine.

SAME.—Instruction to Jury.—Failure to Use Safety Coupler.—When Immaterial.—It was not error to refuse to instruct the jury that the plaintiff could not recover by reason of the fact that he was trying to make the coupling without the use of a safety coupler, which he was required to use by the rules of the company, where there was no evidence that the injury was caused or contributed to on account of a failure to use a safety coupler.

SAME.—Instruction to Jury.—Defining Duties of Yard-Master.—An instruction was properly refused which stated, as a matter of law, what were the duties of a yard-master, in which capacity the plaintiff was acting at the time of the accident, and that his position was more favorable than that of the master to know the fitness of the engine and engineer.

SAME.—Instruction to Jury.—Latent Defects.—Duty of Employer and Employee Concerning.—It was not error to instruct the jury that the plaintiff's duty was to furnish appliances free from latent defects, and that the duty to search for defects did not rest upon the employee.

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SAME.—Instruction to Jury.—Opportunity of Plaintiff to Know.—Fitness of Engine.—It was not error to refuse to instruct the jury that if the plaintiff had worked a certain number of days as yard-master with the engine claimed to be defective, and coupled and uncoupled cars during that time, and saw others do so, and did not object to continuing work, then, as matter of law, he assumed the risk of injury. The instruction took from the jury the right to pass upon the opportunities the plaintiff had to ascertain the fitness of the engine, and stated, as a matter of law, what time the plaintiff would have to work with the engine to be conclusively presumed to have known of any defects existing in the engine.

SAME.—Evidence.—It was proper for the plaintiff to testify what his duties were, if any, as to superintending or looking after the fitness or qualification of the engineer or the fitness of the engine. It was also proper to interrogate a witness as to other defects than the defect in the throttle valve, the complaint having alleged that there were other defects unknown to the plaintiff, but of which the defendant had knowledge. It was not proper, however, to ask an engineer, who was called upon to testify: "If the engine and engineer worked so as to be satisfactory to the yard-master, is there any occasion for complaint," or to ask a witness a question which necessitated a comparison of engines.

PRACTICE.—Overruling Demurrer to Original Complaint.—Effect of Filing Amended Complaint.—Where a demurrer was filed to a complaint and overruled, and exceptions were reserved, but afterwards, on leave of court, the complaint was amended, the amended complaint superseded the original complaint, and there is no longer any question in the record as to the sufficiency of the complaint at the time the demurrer was ruled upon.

SAME.—Examination of Party Out of Court.—Scope of Examination.—Under sections 509 and 510, R. S. 1881, a party may be examined, as a witness, concerning any matter stated in the pleading, but he can not be compelled to testify as to the names of his witnesses and to state by whom he expects to prove this fact or the other.

SAME.—Amendment of Complaint.—When and How May be Made.—The court has the right to allow a party to amend his complaint during the trial and after the evidence is closed, without requiring a showing supported by affidavit.

From the De Kalb Circuit Court.

C. B. Stuart, T. A. Stuart and W. B. Stuart, for appellant.
R. W. McBride, F. S. Blettner and W. L. Penfield, for appellee.

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OLDS, J.—The appellee brought this action against the appellant for damages resulting from an injury alleged to have been caused by the negligence of the appellant. The appellee was acting in the capacity of yardmaster on appellant's railroad at Butler, Ind., and the injury is alleged to have occurred by reason of a defective engine.

It is alleged in the complaint that appellee's duty was the making up of trains of cars, coupling and uncoupling cars; that the engine provided for and used in doing said work was, as appellant and her officers well knew, defective, unsafe and dangerous, and, as appellant well knew, had been thus defective, dangerous and unsafe for a long time prior to the injury; that the defect consisted in this: that the throttle of said engine leaked, and said engine was by reason thereof, and by reason of other defects which appellee is unable to specify, hard to handle, manage and control, and could not be so handled, managed and controlled as to be safe for those engaged in coupling and uncoupling the cars which were propelled by it; such difficulty in managing, handling and controlling being in part caused by the leaking of said throttle and in part by defects unknown to appellee, and which he is unable to more particularly describe or specify, but that said defects combined were such that when said engine was reversed and caused to move backward it would often give a sudden spring or start, and instead of moving backward steadily and with regular motion would move with a sudden rush or spring, and that appellant had long known of said defective and dangerous condition of said engine; that appellant employed as engineer to use, run, manage and control said engine, one John Duerk, who was, as appellant well knew, and had long known, incompetent, unskillful, careless, and unfit to be entrusted with such employment, appellant's agent, whose duty it was to employ such engineer, having long before been informed of the incompetency, unskillfulness, carelessness and unfitness

The Wabash and Western Railway Company v. Morgan.

of said Duerk, but, notwithstanding such notice, continued to employ him and continue him in such employment. It is then alleged that appellee had no knowledge of the defective condition of the engine or of the unskilfulness and unfitness of the engineer.

The manner of the injury is then alleged, showing that it occurred while attempting to make a coupling of the cars; that he signalled the engineer to run back, and that just as the cars were coming together, and as he was about to make the coupling, the engine gave a sudden start or spring driving the cars together with great and unusual force and speed, so that before the appellee could withdraw his hand and step from between the cars he was struck by the one nearest the engine and thrown off his balance and his left hand thrown between the dead-woods and was so crushed and mangled that it became necessary to amputate the same, and it was accordingly amputated and lost to the appellee; that the injury was caused solely on account of the defective condition of the engine and incompetency and unskilfulness of the engineer, and appellee was without fault contributing to the injury.

Numerous errors are assigned. The first error complained of is that the court erred in overruling appellant's motion to make the complaint more specific, in that the appellee should be required to state the length of time the engine had been defective, and the length of time the engineer had been negligent as alleged; the exact defects in the engine; the particulars which constituted the alleged incompetency, unskilfulness, carelessness and negligence of the engineer, and the extent and nature of the injury.

The complaint alleges that the throttle of the engine leaked, and that there were other defects which were unknown to appellee, and which he was unable to specify, but that the appellant had long known of such defects.

The appellee's employment was not such as to require him to possess any knowledge as to the condition of the engine;

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his business was the making up of trains and coupling of cars, and he had no supervision over the engine, and the keeping of the same in repair. He could only have such knowledge of defects in the engine as he might, as a non-expert, learn by observation and gain from others.

He alleges that the throttle leaked and that there were other defects known to appellant, and which were unknown to him, and which he was unable to specify. The complaint was sufficiently specific in this particular.

As regards the length of time the engine was out of repair and the engineer had been negligent, it is alleged that the defects had been long known to the appellant, and that it had long before been informed of the incompetency, unskillfulness and carelessness of the engineer, and had continued him in its employ notwithstanding such notice.

The exact time the company knew of such defects and incompetency and carelessness of the engineer is not material, and the complaint was sufficient, and the allegations as to the engineer's carelessness and incompetency was also sufficient.

The negligence charged against the appellants in this case is the failure to keep in repair the engine used for making up trains, and permitting it to become and remain out of repair after having knowledge of its defective condition, and employing and retaining in its service an incompetent, careless and negligent engineer to operate such engine. Such negligence and failure of duty are alleged in plain, specific terms in the complaint. As we have said, the exact length of time that appellant had such knowledge is not material, it being alleged that the company did have knowledge. The particular defects in the engine should have been stated, if known to the appellee, but the necessity of specifically setting out all of the defects is avoided by the averments that there were other defects which were known to the appellant, but were not known to the appellee. Such being the fact the

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appellee ought not to be required to make the complaint more specific in this particular. He shows his inability to do so.

There was no error in overruling the motion to make the complaint more specific.

The next alleged error complained of and discussed is the overruling of a demurrer to the complaint. There is no such question before us for consideration. There was a demurrer filed to the complaint and overruled and exceptions reserved, but afterwards, on leave of court, the complaint was amended. The amended complaint superseded the original complaint, to which a demurrer was addressed, and there is no longer any question in the record as to the sufficiency of the complaint at the time the demurrer was ruled upon. The next question relates to the ruling of the court in refusing the appellee to answer certain questions when being examined under the statute authorizing the examination of parties. Sections 509, 510, R. S. 1881. On such examination appellant's counsel asked the appellee the following questions:

123. Who has told you that the engine was out of repair?

125. Now, who told you all the above alleged defects of the engine?

129. Now, in regard to the engineer Duerk, who told you that he was incompetent?

The appellee refused to answer the questions, and the appellant appealed to the court and asked that he be ordered to answer them, and the court refused to require him to answer such questions. The statute, section 509, *supra*, provides that a party may be examined as a witness concerning any matter stated in the pleading. It is evident, we think, that the purpose of the statute is that a party may be compelled to testify as to all matters within his own knowledge stated in the pleading. If he has received an injury for which he has sued, he may be compelled to disclose all he knows about it, how it occurred, and in this case all he knows about how the injury occurred, and as to the defective con-

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dition of the engine and incompetency of the engineer, but he can not be compelled to testify as to the names of his witnesses, and to state by whom he expects to prove this fact or the others by. It was not the purpose of the statute to make a party disclose his evidence by which he intends to make his case any further than his own knowledge of the facts stated in the pleading goes.

Some of these questions relate to facts stated in the pleading. The first asked him the name of the person who told him the engine was out of repair. The others are of the same character. They do not concern any matter alleged in the pleading. The right existed to examine the appellee fully as to the defect in the engine, which is the fact alleged, but who he talked with and who told him about the defects is not a matter alleged in the pleading.

There was no error in the ruling of the court.

The next alleged error is the ruling of the court in permitting appellee to amend his complaint during the trial and after the evidence was closed. This was a matter within the discretion of the court, and there is no abuse of discretion shown.

It is contended that such an amendment could only be made at the time it was done on proper showing supported by affidavit. The court had the right to allow it without such showing. *Chicago, etc., R. W. Co. v. Jones*, 103 Ind. 386; *Meyer v. State, ex rel.*, 125 Ind. 335; *Chicago, etc., R. W. Co. v. Hunter*, 128 Ind. 213.

Appellant contends that the court erred in overruling its motion to strike out certain interrogatories propounded to the jury by the appellee.

The discussion of counsel relates solely to interrogatory numbered twenty-five. This interrogatory was clearly proper. It asks if Mudd, the foreman of the shops of appellant at Butler, was not notified in November, 1888, by Crider, an engineer, of the defective engine, that the engine was in an

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unsafe and unfit condition, and liable to be wrecked unless it was taken into the shops and repaired.

We next come to the instructions given and refused.

Counsel first contend that instructions numbered eleven, given by the court, and numbered twenty-six, given at the request of the appellee, are erroneous. They both relate to the question of the measure of damages. These instructions are substantially the same. We do not deem it necessary to set them out. We see no objection to the measure of damages stated in either instruction. They state that the damages shall be ascertained on the basis of compensation, and be such as will fairly compensate him for the injuries sustained; that in making such estimate the jury should take into consideration appellee's physical and mental suffering if any were caused by and arising out of the injury, the character of the injury, whether temporary or permanent, and great reduction, if any, in plaintiff's ability to earn money caused by the injury, and that their verdict should be for such sum as will fairly compensate appellee for all injury thus sustained.

There was no erroneous statement of the rule governing the assessment of damages contained in either of the instructions.

Objection is made to the instructions given defining the master's duty in regard to furnishing safe machinery and the keeping of it in repair. It is contended that by the language used in the instructions, and by the oft repeating of it, the jury were given to understand that the duty of the master went to the extent of requiring him to absolutely warrant the machinery, and that it must be free from latent defects. We have carefully read and considered the instructions, and we do not think they will bear the construction placed upon them by counsel for the appellant.

The court in the ninth instruction tells the jury that the master is not bound to use the highest care, nor to use the latest or most improved machinery, but he is bound to use

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care, skill and prudence in selecting and maintaining machinery and appliances, and for a negligent omission of this duty he is answerable to a servant injured by the omission. The master should take notice of the liability of the parts of machinery to wear out and become defective, so the duty of the master to provide safe machinery and appliances is a continuing one. He must supervise, examine and test his machinery as often as custom and experience requires.

At the request of the appellant the jury was fully instructed as to the relationship of the master and servant, and as to the duty of the master in the employment of servants, and the risks of a fellow-servant, the difference in the obligations of a railroad company to a passenger and to an employee, and in the 16th instruction the jury are told that "the law does not hold the master as an insurer of the safety or sufficiency of his machinery. His duty is fully discharged when he has used ordinary care in furnishing machinery and providing facilities and men for the keeping of the same in repair." Taking the instructions as a whole, we think they fairly state the law.

The instructions are entirely too long, and contain repetitions in some instances, but the instructions favorable to the appellant, as well as those favorable to the appellee, are lengthy and present almost every conceivable legal principle that would be of any benefit to the appellant, so that we think no harm was done by the numerous instructions, and in some instances repetitions of legal principles favorable to appellee given by the court on its own motion and at the request of the appellee.

The third instruction relates to notice on the part of the appellant of the defective engine, and by it the jury are told that they "may find such notice to be proved if you think it may be rightfully and reasonably inferred from the evidence given in the case, although there may be no direct testimony as to such notice."

There was no error in giving this instruction. Facts may

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have been proven that would have shown that the appellant or its proper officers could not have avoided knowing of such defect, though no actual or formal notice had been given them. The charge in the complaint is that "appellant has long known of said defective and dangerous condition of said engine." This instruction was proper in view of the averments of the complaint.

Special objection is made to the 14th instruction in relation to the duty of the master and servant to be on the alert to ascertain defects and avoid danger. This instruction is in accordance with the law as held in the case of *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566.

It is next urged that the court erred in refusing instructions requested by the appellant. The second instruction was refused. It is an instruction to the effect that there was a failure of proof to show that the engineer was unskilful, incompetent and negligent, and that the appellant had knowledge of his unfitness a sufficient length of time prior to the accident to have provided against it, and therefore the jury should find for the appellant. This instruction was properly refused under the averments of the complaint. The appellee might have recovered by reason of the defects in the engine. The third was an instruction to find for the appellant for the reason that there was no testimony showing the engineer incompetent. This was also properly refused. The seventh instruction, that the appellee could not recover by reason of the fact that he was trying to make the coupling without the use of a safety coupler, when the rules of the company required him to use one, was properly refused, there being no evidence that the injury was caused or contributed to on account of a failure to use a safety coupler. It is not alleged that the injury occurred while having his hands engaged in making the coupling, but the car struck him, causing him to throw his hand between the deadwoods. His hand was not between the deadwoods when injured by reason of attempting to make a

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coupling, but on account of his being struck by the car, causing him to put his hand between the deadwoods when it was injured.

The appellant insists that instruction eighteen, requested by it, ought to have been given. This instruction states, as a matter of law, what the duties of the yardmaster, in which appellee was acting, are, and that his position is more favorable than that of the master to know the fitness of the engine and engineer. The instruction was erroneous, and the court did right in refusing to give it to the jury. The court also refused to give instruction twenty-five. This instruction told the jury that if appellee had worked a certain number of days as yardmaster with the engine claimed to be defective, and coupled and uncoupled cars during that time, and saw others do so, and did not object to continuing work, that in such event they were told, as a matter of law, that the appellee had reasonable opportunities, by the exercise of ordinary care, to have known whether the engineer was competent or the engine fit for the work, and by his continuing to work without protest or objection he assumed the risk of injury by reason of the unfitness of either engineer or of the engine, and the defendant is not liable in this action.

This instruction was erroneous. It took from the jury the right to pass upon the opportunities the appellee had to ascertain the fitness of the engine, and was saying, as a matter of law, what time the appellee would have to work with the engine to be conclusively presumed to have known of any defects existing in the engine. It was for the jury to say whether or not the appellee had such opportunities to judge of the sufficiency of the engine as to be conclusively presumed to have such knowledge and assume the risk. There was no error in refusing this instruction.

Appellant moved the court for judgment in its favor on the answers to interrogatories, which motion was overruled.

There were a large number of interrogatories submitted

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and answered by the jury. Most of them support the general verdict, and there is no such inconsistency with the general verdict that they should prevail over the verdict and to entitle the appellant to a judgment; and the motion for judgment on the interrogatories was properly overruled. Appellant also moved for a *venire de novo*. No reason is given why this motion should have been sustained, except to say that the verdict of the jury is so ambiguous, defective and uncertain that no judgment can be rendered upon it. Our attention is not called to any defects in the verdict.

Appellant moved in arrest of judgment. This presents a question as to the sufficiency of the complaint. We deem it unnecessary to discuss at any further length the sufficiency of the complaint. The complaint is clearly good to withstand a motion in arrest, indeed we regard it sufficient on demurrer. We have not set it out in full, as no good would be accomplished by doing so.

The next question arises on the motion for a new trial, and relates to the sufficiency of the evidence to sustain the verdict. No good can be accomplished by setting out and discussing the sufficiency of the evidence. We can not weigh the evidence. It is sufficient if there is evidence from which the jury may have reasonably found as they did, and we think the evidence in this case fairly supports the verdict. The injury is clearly shown, and that the engine was defective and known to be defective by the appellant and neglect to repair is shown, and from which the jury may have found that the injury was the result of the defective engine, and that the appellee had no knowledge of the defective engine, and that he was without fault contributing to the injury.

When the appellee was testifying as a witness in his own behalf he was asked: "Was it any part of your duty to superintend or look after the fitness or qualifications of the engineer?" And a like question was asked regarding the engine, to which the appellant objected, and the objection was overruled and exceptions reserved. These questions

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were entirely proper. It is said that the duties of yardmaster are prescribed by the company. That may be true, and yet the questions be proper. It was proper to show what his duties were. Another witness was asked a like question.

A witness was asked concerning other defects than the defect in the throttle valve, and it is insisted that this was error, for the reason that no other defect was specifically alleged, and that appellant moved to make the complaint more specific in this respect, that the appellant was in court to meet the charge of a defective throttle valve. The complaint avers that there were other defects in the engine of which appellant had knowledge, but which defects were unknown to appellee. The defects being unknown to appellee, he could not specifically name and describe them, but the averments in the complaint entitled him to make proof of other defects if any existed. If he were injured by reason of defects unknown to him and known to the appellant, he could not be prevented from recovering on account of his want of knowledge and inability to specify and describe such defects.

Appellant then moved to strike out all evidence relating to any defects except the throttle valve, which was overruled. What we have said disposes of this question. The ruling was correct.

Appellant asked an engineer, who was testifying as a witness, "If the engine and engineer worked so as to be satisfactory to the yardmaster, is there any occasion for complaint?" and he answered, "No, sir."

The appellee moved to strike out the answer, and the court sustained the motion, and this ruling is assailed as error. This ruling was clearly right. The question and answer had no possible relevancy or bearing on the issues in the case.

A similar question was propounded to another witness, and the court held it incompetent. Another witness was asked which was the safer engine to use, a road engine or a switch engine, and the court held it incompetent. A comparison

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of engines was incompetent for any purpose, and the comparison sought to be made was not even with the defective engine in use at the time the appellee was injured. On cross-examination of one Ulerich an objection to a question was sustained for the reason that it was not cross-examination. In this there was no available error.

Some objections are made to the ruling of the court on questions propounded to appellee when testifying as a witness. We have examined them, and there is no error in the ruling.

There is no available error in the record.

Judgment affirmed, with costs.

MCBRIDE, J., took no part in this decision.

Filed June 16, 1892.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—In the brief of appellant's counsel on the petition for a rehearing, it is argued with ability and earnestness that this court erred in not reversing the judgment because of the error of the trial court in instructing the jury as to the degree of care required of an employer in providing his employees with safe appliances.

We fully agree with counsel that an employer is not bound to exercise extraordinary care to provide safe appliances. The care required of him is ordinary care, but the dangers of the service of which the employer has knowledge, or of which he is bound to take notice, are always to be considered in determining what constitutes ordinary care. There is no exact test to which cases can be indiscriminately subjected, nor is there any rigid standard by which all cases can be measured. What would be ordinary care in one class of cases might be far otherwise in other and different classes.

The fourteenth instruction, against which the attack is particularly directed, contains some statements which can

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not, if considered apart from other instructions, be deemed accurate. The instruction reads thus: "Railroad employees are presumed to understand the nature and hazard of the employment when they engage in the service, and they assume all ordinary risks and obvious perils incident thereto. Such risks are presumably within the employee's contract of service. This does not mean, however, that the latter may not repose confidence in the prudence and caution of the employer, and rest on the presumption that he has also discharged his duty by supplying machinery free from latent defects which expose the employee to extraordinary and hidden perils. While the employer may expect that an employee will be vigilant to observe, and that he will be on the alert to avoid all known and obvious perils, even though they may arise from defective tools and machinery, yet the latter is not bound to search for defects or inspect the appliances furnished him to see whether or not there are latent imperfections in and about them which render their use more hazardous. These are duties of the master, and unless the defects are such as to be obvious to any one giving attention to the duties of the occasion the employee has a right to assume that the employer had performed his duty in respect to implements and machinery furnished."

An analysis of this instruction shows that it contains general statements that are unquestionably correct, and these statements give tone and effect to the specific instruction when considered, as it must be, in connection with the series of instructions of which it forms a part. It is true, in a general sense, that a duty rests upon the employer "to see whether there are latent defects" in the appliances with which he requires the employee to make use of in the line of his service. The employer is bound to make reasonable inspection of the appliances furnished the employees to discover latent defects, and a neglect to make such an inspection is a culpable breach of duty. *Northern Pacific R. Co. v. Herbert*, 116 U. S. 642; *Matchett v. Cincinnati, etc., R.*

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W. Co., ante, p. 334; *Ohio, etc., R. W. Co. v. Percy*, 128 Ind. 197; *Cincinnati, etc., R. R. Co. v. McMullen*, 117 Ind. 439. This duty to inspect implies, of course, that the employer will not subject the employee to concealed defects which an inspection conducted with ordinary care would have revealed. Obvious defects, open to ordinary careful observation, are perils of the service, but latent defects, or defects not discoverable by the exercise of reasonable care, are not perils incident to the service, and hence are not assumed by the employee. *Rogers v. Leyden*, 127 Ind. 50, and cases cited; *Ohio, etc., R. W. Co. v. Percy, supra*; *Matchett v. Cincinnati, etc., R. W. Co., supra*. It was, therefore, not error to direct the jury that the employer's duty was to furnish appliances free from latent defects, nor was it error to direct them that the duty to search for such defects did not rest upon the employee. To affirm that such a duty rests upon the employee would, it is evident, require the employee to perform the duty of inspection, and to affirm this would involve a denial of the rule that the duty of inspection rests upon the employer. The inaccuracy in the instruction, in so far as concerns the point under immediate mention, is in failing to properly guard the statement of the employer's duty by adding to the statement that he was bound to exercise only ordinary care, or words of similar import.

If an employee knows, or should know by the exercise of ordinary care, of defects adding to the perils of his service, he can not, as a general rule, recover for injuries attributable to such defects, hence it is correctly held that he must aver that the defects were unknown to him. *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75; *Louisville, etc., R. W. Co. v. Sandford*, 117 Ind. 265; *Brazil, etc., Coal Co. v. Young*, 117 Ind. 520; *Louisville, etc., R. W. Co. v. Corps*, 124 Ind. 427; *Matchett v. Cincinnati, etc., R. W. Co., supra*; *Philadelphia, etc., R. R. Co. v. Hughes*, 119 Pa. St. 301; *Wilson v. Winona, etc.,*

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R. R. Co., 37 Minn. 326; *Gaffney v. New York, etc., R. R. Co.*, 15 R. I. 456.

But where the defect is hidden, this established rule can not fully apply, for the fact that such defects are hidden, when properly proved, may negative the inference that the employee knew of their existence, or was chargeable with such knowledge. As it was latent defects only to which the court referred in the instruction, it is not incorrect in itself upon the point to which we here are directly addressing our discussion. The jury could not have understood that the court referred to any other than latent defects, and it can not be justly said that they were misled upon this point.

It is undoubtedly true that an employee may, within reasonable limits, act upon the presumption that the employer has discharged his duty by exercising reasonable care to supply appliances free from such latent defects as augment the perils of the service. *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212 (219); *Hard v. Vermont, etc., R. R. Co.*, 32 Vt. 473.

The general rule is that negligence or breach of duty is not presumed, and this rule must benefit the employee as well as the employer. It can not be a sword to the one and a shield to the other. But the rule to which we have referred does not authorize an employee to act without care. He must, notwithstanding the presumption, use reasonable care, but reasonable care, as we have seen, does not cast upon him the duty of making an inspection to discover latent defects. It is evident from what we have said that the instruction is not erroneous, because it states that the presumption is that the employer's duty was performed. It is probably true that the language employed is too broad, and that it should, in order to express the law with accuracy, have been limited by incorporating into the instruction appropriate words expressing the rule that ordinary care is required of the employee. But the instruction is to be construed as part of the entire series, and when thus construed we can not say that there is

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available error, even if we could say so much if the instruction stood entirely alone. Other instructions do explain the one under direct examination, and, taking the entire series into consideration, we certainly can not adjudge that there was such error as requires a reversal.

Counsel say that "It is true, that the court below in some places gave some substantially correct instructions," but they contend that the other instructions in the case necessarily misled the jury because of repeated erroneous statements. They also say that the giving of an erroneous instruction is not cured by giving a contradictory one, unless the erroneous instruction is withdrawn, and they refer us to Elliott's Appellate Procedure, section 705. We recognize the general rule stated by counsel, but we must also keep in mind and justly regard another rule, and that is this, instructions are to be construed as an entirety. See authorities cited in Elliott's Appellate Procedure, section 648. Applying the rule last mentioned, and keeping in view the general statements in the instructions to which objections are urged, and the specific statements in other instructions, we feel bound to adhere to our original opinion.

We do not deem it proper to here discuss other questions, for we think the disposition made of them in the original opinion is the correct one.

Petition overruled.

Filed Oct. 13, 1892.

The Phenix Insurance Company of Brooklyn v. Wilson.

No. 14,391.

THE PHENIX INSURANCE COMPANY OF BROOKLYN v.
WILSON.

INSURANCE.—Action on Policy.—Sufficiency of Complaint After Verdict.—Averment as to Ownership.—Performance of Condition.—In an action on a policy of fire insurance, where the sufficiency of the complaint is not challenged until after the verdict has been returned, an allegation in the complaint that the plaintiff was the owner of the property at the time of its destruction by fire, is a sufficient allegation that he was the owner in fee of the real estate and the absolute owner of the personal property. Where the complaint alleged in detail a performance of the condition resting upon the assured, a general allegation of the performance was unnecessary.

SAME.—Complaint.—Averment Concerning Proof of Loss.—An allegation that the second day after the fire the plaintiff gave notice thereof in writing to the company at its office as by the policy provided, is sufficient after verdict to show that proofs of loss were duly furnished.

SAME.—Interrogatories in Application.—Answers to.—Age and Value of Building.—Expression of Opinion.—Where by the terms of a policy of fire insurance answers to interrogatories in the application are made warranties, answers as to the age and value of the building insured will be regarded as mere expressions of opinion.

From the Boone Circuit Court.

J. McCabe and *E. F. McCabe*, for appellant.

B. S. Higgins and *W. J. Darnell*, for appellee.

BERKSHIRE, C. J.—This action has for its foundation an insurance policy issued by the appellant to the appellee. The policy covered a certain dwelling-house in which the appellee resided, and certain personal property contained therein. Preliminary to the execution of the policy, the appellee executed and forwarded to the general office of the appellant, in Chicago, his application for insurance. The policy refers to an application in terms which make the two but one contract.

The appellant answered the complaint in three paragraphs,
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the two first of which were affirmative answers, and the third the general denial.

The first and second paragraphs rest upon the theory that the answer of the appellant to each interrogatory contained in his "application," by the terms and conditions of the policy became and was a warranty, and if not an exact statement of the fact to which it related the policy was without virtue from the beginning.

The first paragraph in the answer rests upon an inaccuracy of statement in the answer made to the fourth interrogatory, and the second paragraph has for its foundation incorrectness of statement in the answer to the second interrogatory.

The answer to the fourth interrogatory fixed the value of the building insured at \$700, and it is alleged in the first paragraph of answer that the real value was but \$400.

The answer to the second interrogatory named ten years as the age of the building, and the second paragraph of answer avers that the building was twelve years old.

The appellee challenged each of these paragraphs of answer by demurrer, and the court overruling the same, he preserved his exception, and filed his reply. The cause was then submitted to a jury for trial, who thereafter returned a special verdict, after which each party moved for judgment upon the verdict.

The court overruled the appellant's motion, and sustained the motion of the appellee and rendered judgment for the appellee, and the appellant saved the proper exceptions. Judgment was then rendered for the appellee. The errors assigned call in question the sufficiency of the complaint for the first time, the rulings of the court in refusing to render judgment for the appellant, and in rendering judgment for the appellee.

The objections made to the complaint are three in number: (1) There is no allegation of proof of loss, as required by the conditions of the policy. (2) It is not al-

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leged that the appellee was the unconditional owner in fee of the real estate on which the building destroyed was located. (3) Nor is it alleged that the appellee performed the conditions of the contract on his part.

It is sufficient to say that we find no infirmity in the complaint that the verdict did not cure.

It is alleged in direct terms that the appellant was the owner of the property insured at the time of its destruction by fire. This averment can have no other construction than an averment of absolute ownership in the appellee. *Phoenix Ins. Co. v. Stark*, 120 Ind. 444; *Phoenix Ins. Co. v. Rowe*, 117 Ind. 202; *Traders Ins. Co. v. Newman*, 120 Ind. 554, and cases cited.

There is no allegation in general terms that the appellee performed all the conditions of the contract on his part (an oversight, no doubt), but such an allegation was wholly unnecessary if all these conditions and their performance were covered by specific allegations.

The promissory note which the appellee had executed to the appellant was not due when the loss occurred, and hence the only condition, precedent to a right of action, resting on the appellee was to furnish proofs of loss as required by the policy.

The fire occurred on the 20th of February, 1885, and it is alleged in the complaint that on the next day but one thereafter the appellee gave notice thereof in writing to the appellant company, at its Chicago office, as by the said policy provided. This is in effect an allegation that proofs were furnished as required by the policy.

We are inclined to the opinion that the complaint would have been good had its sufficiency been tested by demurrer, although not skilfully drafted, but as it is unnecessary to decide this question we leave it undecided. But see *Phenix Ins. Co. v. Golden*, 121 Ind. 524; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155.

If the allegations in the complaint were not sufficiently

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specific there should have been a motion to make them more specific.

Cross-errors have not been assigned, but it becomes proper for us to consider the sufficiency of the paragraphs of answer demurred to in reaching a conclusion as to the ruling of the court in sustaining the motion of the appellee and overruling the motion of the appellant for judgment upon the verdict of the jury.

Both paragraphs of the answer are bad, and the demurrer thereto should have been sustained; but in this connection it is due to the honorable judge who presided at the trial, and in the formation of the issues joined in the cause, that we state that the decisions of this court, with which our conclusion accords, had not been announced when the various rulings here involved were made and judgment rendered.

The cases to which we refer are: *Rogers v. Phenix Ins. Co.*, 121 Ind. 570; *Phenix Ins. Co. v. Pickel*, *supra*; *Pickel v. Phenix Ins. Co.*, 119 Ind. 291.

The influence of the cases cited can not be avoided, as they were actions upon policies issued by the appellant company upon applications substantially, if not identically, the same as the application here under consideration.

As the answers to interrogatories were mere expressions of opinion, and at most mere representations, it becomes wholly immaterial in this case whether the house was of greater age than stated or of less value than stated; and this being true, there can be no question as to the propriety of the court's ruling that the appellee was entitled to judgment upon the verdict of the jury.

We find no error in the record.

Judgment affirmed, with costs.

Filed Oct. 28, 1892; petition for a rehearing overruled Jan. 29, 1891.

Fulton et al. v. Cummings et al.

No. 15,803.

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138	605
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GRAVEL ROAD.—*Proceedings to Construct, Before County Commissioners.*—*Appeal to Circuit Court.*—*Special Verdict.*—Where, in a proceeding for the construction of a free gravel road, an appeal is taken to the circuit court, the special verdict need not find who own a majority of the acres which are benefited, neither need it find that all the land-owners in the county whose lands are benefited have signed the petition without regard to the fact that they have not been included in the report of the viewers. The verdict is sufficient if it discloses the fact that the names and acres named therein constitute a majority of the names and acres reported by the viewers as benefited. See section 5095, R. S. 1881. The only mode by which the commissioners can determine its jurisdiction to make the order for the improvement is by comparing the names and acres found in the report of the viewers with the names found on the petition.

SAME.—*Trial de Novo.*—Upon appeal from the finding of the board of county commissioners the cause is tried *de novo*, but no question can be tried on appeal that was not presented to the board of commissioners before the appeal was taken.

SAME.—*Special Verdict.*—*Description of Lands.*—Where the lands of the appellants are sufficiently described in the special verdict, they can not complain that other descriptions are vague and uncertain.

SAME.—*Evidence.*—*Report of Viewers.*—Upon appeal it was proper to allow the report of the viewers made to the board of commissioners with a plat of the lands reported benefited attached as an exhibit to be read to the jury, the court instructing the jury that the contents of these papers was not evidence of the facts therein contained. Without this report before them the jury could not intelligently apply the evidence adduced to the jurisdictional facts of the case.

SAME.—*Report of Viewers.*—*Binding Upon Parties.*—It was not error to refuse to permit the appellant to prove that land outside the territory fixed by the viewers would be benefited by the proposed improvements. Unless the report of the viewers is attacked before the board of commissioners upon the ground that it does not contain all the land benefited, the parties interested are bound by the report of the viewers as to the limit of the territory to be assessed.

SAME.—*Incompetency of Jury.*—*Relationship.*—One of the jurors answered upon his examination that he was not related to a family residing in the vicinity of the proposed improvement. He was in fact a full cousin of the wife of one of the members of said family whose lands were assessed for the improvement, but the husband was neither a petitioner nor a remonstrant, nor was he party to the appeal to the circuit court.

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Held, that as he was not in the circuit court no judgment could be rendered affecting his rights, and this being so, that the juror was not disqualified to serve because of the relationship to his wife.

SAME.—*Appeal to Circuit Court.—Cause Certified Back to Commissioners.—Re-appointment of Old Viewers*—Where an order was made by the board of county commissioners for the construction of a free gravel road, and upon appeal to the circuit court the order was set aside as to one of the parties alone upon the ground that he had not received proper notice, and the cause was certified back to the board for further proceedings, it was not error for the board to reappoint the old viewers, it not being claimed that they were guilty of any partiality in the discharge of their duties.

SAME.—*Report of Viewers.—Correction of.—New Notice.*—If the report as originally filed by the viewers was defective, it was proper for the board to refer it back to them for correction, they not having been discharged. A new notice was not necessary.

SAME.—*Inequalities in Proceedings Before Commissioners.—When May be Disregarded.*—Unless the inequalities in the proceedings before the board of county commissioners in a proceeding to construct a free gravel road are of a character which affect the substantial rights of the parties, they should be wholly disregarded.

From the Huntington Circuit Court.

J. B. Kenner, O. W. Whitelock, L. P. Milligan, S. E. Cook and Z. T. Duncan, for appellants.

M. L. Spencer, J. C. Branyan, W. A. Branyan and W. H. Trammel, for appellees.

COFFEY, J.—This was a petition filed with the board of commissioners of Huntington county, praying for the construction of a free gravel road. Such proceedings were had before the board as resulted in an order for the improvement prayed. From this order the appellants here appealed to the Huntington Circuit Court, where the cause was tried by a jury, resulting in a special verdict, upon which the court rendered judgment for the appellees. The material facts appearing by the special verdict are, that the petition was filed with the board of commissioners of Huntington county on the 4th day of June, 1885. Upon filing the petition and the bond required by the statute, the board appointed three disinterested freeholders of the county, and a

competent engineer, to view the road, and directed them to proceed, on the 17th day of July thereafter, to view the road and perform the other duties imposed upon them by law. The county auditor gave the statutory notice of the time and place of meeting. After qualifying, the viewers proceeded, on the day named, to perform the duties assigned them, and subsequently filed their report with the board, at its ensuing September term. The report, not being satisfactory, was referred back to the viewers for correction, and the matter was continued until the December term of the board. At the December term the report, as corrected, was refiled with the board, whereupon, by agreement between the petitioners and remonstrators, the petition was referred to James M. Hatfield to ascertain whether the petition was signed by the requisite number of land-owners to give the board jurisdiction, and the cause was continued until the 15th day of December. On that day Hatfield filed his report, which was accepted by the board, but no further action was taken thereon until the 1st day of June, 1886, when the board of commissioners entered a finding that the petition had been signed by the requisite number of land-owners whose lands would be benefited by the proposed improvement, and at the September term following entered an order for the improvement.

At the same term the board appointed three disinterested freeholders viewers to assess and apportion the estimated cost of the improvement, and directed them to meet on the 25th day of October thereafter for that purpose. This committee entered upon the performance of its duties at the time designated, and filed its report with the county auditor, who gave the statutory notice of the time when the same would be heard and examined by the board of commissioners. The board met at the time designated, and upon exceptions filed the matter was referred to a new committee, who likewise filed their report which, after a new notice by the auditor, was accepted and confirmed.

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The special verdict expressly finds that the petition, at the time the board of commissioners made the order for the improvement, was signed by the necessary number of land-owners reported to be benefited by the proposed improvement, to authorize such order.

It is earnestly insisted by the appellants that the circuit court erred in overruling their motion for a *venire de novo*.

It is insisted that the special verdict, which purports to find the land-owners who are benefited, and ought to be assessed for the improvement, does not show who own a majority of the acres which are benefited, and does not find the fact, and does not find that the names and acres set out in the finding are all the lands and owners of the county benefited and ought to be assessed in the territory benefited by the improvement.

The special finding does disclose the fact that the names and acres named therein constitute a majority of the names and acres reported by the viewers as benefited, but the appellants contend that this is not sufficient.

Section 5095, R. S. 1881, provides that, "Upon the return of the report mentioned in the last section, the commissioners shall, if in their opinion public utility requires it, enter upon the record an order that the improvement be made. * * But such order shall not be made until a majority of the resident land-holders of the county whose lands are reported as benefited and ought to be assessed, and also the owners of a majority of the whole number of acres of all lands that are reported as benefited and ought to be assessed, shall have subscribed the petition mentioned in the second section of this act (section 5092)."

Under the provisions of this act the only mode by which the board of commissioners can determine its jurisdiction to make the order for the improvement is by comparing the names and acres found in the report of the viewers with the names found on the petition. If it be true, as contended by the appellants, that upon appeal to the circuit court it must

be shown that all the land-owners in the county whose lands are benefited have signed the petition without regard to the fact that they have not been included in the report of the viewers, then the board would never know whether it had jurisdiction or not, and would make the order in each case subject to the right of another court to declare it had no power to make it, though the parties interested had complied with every requirement of the statute. We do not think the statute should receive any such construction.

We do not hold that the parties interested may not, upon the return of the report of the viewers, attack it before the board, by proper pleading, upon the ground that it does not include all the land benefited, and procure new viewers and a new report; but no such question is presented here, for nothing of the kind was attempted. Unless some such action is taken, we think the parties interested are bound by the report of the viewers as to the limit of the territory to be assessed. It is true that upon appeal the cause is tried *de novo*, but the case thus tried is the case that was pending before the board of commissioners, and not a new case. It is well settled that no question can be tried on appeal that was not presented to the board of commissioners before the appeal was taken. *Wilkinson v. Lemasters*, 122 Ind. 82.

In our opinion the special verdict is not defective in the matter suggested.

It is also contended that some of the descriptions of land to be assessed, contained in the special verdict, are so vague and uncertain as to render such descriptions void.

We have carefully examined the descriptions of the lands belonging to the appellants, and do not think such descriptions are subject to the objections urged against them. They can not be heard to complain of other descriptions. *Hopkins v. Greensburgh, etc., T. P. Co.*, 46 Ind. 187.

The special verdict expressly finds that the improvements asked will be of public utility. The court did not err, in

our opinion, in overruling the motion of the appellants for a *venire de novo*.

It is next insisted by the appellants that the court erred in overruling their motion for a new trial.

During the progress of the trial the appellees were permitted by the court to read to the jury the report of the viewers made to the board of commissioners, with a plat of the lands reported benefited attached as an exhibit. It is contended that this action of the court was erroneous.

The court instructed the jury that the contents of these papers were not evidence of the facts therein contained. This report, with the exhibit attached to it, was one of the papers in the cause, and fixed, as we have seen, the limit of the territory to be assessed for the construction of the road. Without this report before them, the jury could not intelligently apply the evidence addressed to the jurisdictional facts in the case. Being a paper in the cause, which, in a sense, defined the issues between the parties, it was not error to read the same to the jury, under the limitations fixed by the court. *Bennett v. Meehan*, 83 Ind. 566; *Metty v. Marsh*, 124 Ind. 18; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582.

For the reasons already given, the court did not err in refusing to permit the appellants to prove, on the trial of the cause, that land, outside the territory fixed by the viewers, would be benefited by the proposed improvement.

One Ulrich Lahr, a bystander, was called and served as a juror in the trial of the cause. Upon his examination he answered that he was not related to the Lahr family residing in the vicinity of the proposed improvement. After the usual questions, he was accepted and sworn as a juror. He is, in fact, a full cousin to Mary Strouder, the wife of John Strouder, one of the persons whose lands are assessed for the improvement. Mrs. Strouder's name before her marriage was Mary Lahr. John Strouder, Mary Strouder and others filed their affidavits showing the above facts.

While the lands of John Strouder were assessed for the

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improvement of the road in question he was neither a petitioner nor a remonstrant, nor was he a party to the appeal to the circuit court. He seems to have been content with the assessment made against him by the board of commissioners.

The appeal to the circuit court did not vacate the order for the improvement as to him, nor did it vacate his assessment. He was not in the circuit court, and it had no jurisdiction over him. *Hight v. Claman*, 121 Ind. 447; *Stipp v. Claman*, 123 Ind. 532.

As he was not in the circuit court, no judgment could be rendered affecting his rights, and this being so, we can see no reason for setting aside the verdict because one of the jurors was related to his wife.

The evidence in the cause is conflicting. Added to this is much confusion, growing out of the efforts of some who signed the petition to withdraw their names, and the efforts of others who had withdrawn their names from the petition to have them reinstated. We can not undertake to weigh this conflicting evidence and untangle the confusion found in the record. The evidence tends to support the verdict of the jury.

It is contended, however, that the circuit court erred in overruling the motion of the appellants to set aside the report of the viewers and vacate all the proceedings of the board of commissioners subsequent to such report, and to remand this cause back to the board for further proceedings.

Prior to the order from which this appeal is prosecuted the board of commissioners entered an order for the improvement in controversy.

Upon appeal to the circuit court that order was set aside as to Andrew Fulton alone, upon the ground that he had not received proper notice. After the cause was certified back to the board for further proceedings, the original petition seems to have been refiled, but there is a dispute between counsel as to whether this is to be regarded as an

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abandonment of the old proceedings and the beginning of a new one, or as to whether it is to be regarded as a continuation of the case. However this may be, it is certain that the first order made for the improvement has not been vacated, and is still in force. It would have been a proper proceeding when the cause was returned from the circuit court to have reappointed the viewers with directions to proceed against Andrew Fulton, and had this been done it would, perhaps, have saved some complication of the record. Upon refileing the petition the petitioners asked that the viewers who had formerly acted be reappointed. This the appellants resisted upon the ground that they were not disinterested, having by their former report formed and expressed an opinion, but their objections were overruled, and the old viewers were reappointed.

We perceive no substantial error in this action of the board of commissioners. It is not claimed that the viewers had any partiality in favor of any party to be affected by their action, or that they had any prejudice against any one so affected. By reason of their familiarity with the road, and the land composing the territory to be assessed, they were, perhaps, better qualified to do the work than any one else. It is not claimed that they were guilty of any partiality in the discharge of their duties.

After performing their duties the viewers filed their report as required by law. Objections being made to the report, it was referred back to them for correction. After its correction it was refiled and accepted, and acted upon by the board without any further notice. It is contended by the appellants that a new notice should have been given.

If the report as originally filed by the viewers was defective, it was proper for the board to refer it back to them for correction, as they had not been discharged. *Barnhill v. Mill Spring, etc., G. R. Co.*, 51 Ind. 354.

A new notice was not necessary. The report was not referred back to the viewers to review the road and the land

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to be assessed, but to obtain a correct report of what they did while acting under the notice which had been given. The corrected report filed by them, and upon which the board acted, is presumed to be a correct showing of their action at the time and place named in the notice of their appointment and meeting.

In our opinion the court did not err in overruling the motion of the appellants to set aside the report of the viewers. There are no doubt irregularities in the proceedings of the board of commissioners in the case before us, but such irregularities are to be expected in a tribunal composed of men who have not made the law a special study. Unless they are of a character which affects the substantial rights of the parties, they should be wholly disregarded. We have carefully examined all the questions presented for our decision by the record before us, and find no error which would warrant us in reversing the judgment of the circuit court.

Judgment affirmed.

Filed April 7, 1892; petition for a rehearing overruled Oct. 15, 1892.

No. 15,865.

THE STATE, EX REL. JOSEPH, GUARDIAN, v. MITCHELL
ET AL.

GUARDIAN AND WARD.—*Real Estate.—Conversion of Funds.—Additional Bond.*

—*Action Upon.*—A guardian of certain minor children was about to receive money resulting from the sale of real estate of the wards in another State. The court ordered the guardian to give another bond before receiving the proceeds of said sale, which he did, and after receiving the money and accounting with some of the wards when they became of age, he converted the remaining funds to his own use and left the State. The court removed him as guardian, and appointed another guardian in his stead, who instituted suit on the second bond for the money converted. The defendants answered that the bondsmen

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on the first bond were solvent, and that no steps had been taken to recover the money converted from them. This answer was demurred to, and the demurrer was overruled.

Held, that as there is nothing to indicate any intention to make the second bond subsidiary to the first, but on its face it appears to be a primary security for the money, suit could properly be instituted on the second bond alone, or on the first and second bonds together, or on the first bond alone, as they were both primary undertakings relating to the same matter.

From the Vigo Circuit Court.

I. N. Pierce, for appellant.

G. W. Faris and *S. R. Hamill*, for appellees.

OLDS, J.—John H. Lanan was by the Vigo Circuit Court, on the 23d day of April, 1882, duly appointed guardian of Lizzie, Maggie, Arthur and Ira C. Lanan, minor heirs of one Jessie Lanan, deceased, and duly executed his bond as such guardian in the sum of \$3,300, with the appellees, Isaac A. Mitchell and Wilson Naylor as sureties. The minor children were the owners of certain real estate in the State of Pennsylvania which descended to them from their grandfather, and in November, 1882, George Foliat, guardian of said minors, appointed by the orphan's court of Allegheny county, Pennsylvania, sold said real estate for the sum of \$1,633.33, and for reasons satisfactory to the court the Vigo Circuit Court ordered the giving of another bond by said John H. Lanan as guardian before the receipt of said money from the sale of said real estate. The guardian acquiesced in said order, and executed a new bond in the sum of \$3,400, with said appellees, Isaac A. Mitchell and Wilson Naylor, and the appellee, Louis Bressett, as sureties. The bond recites the facts relating to the ownership and sale of the land in Pennsylvania, and that said George Foliat, guardian, was about to ask said orphan's court to make an order for the payment of the amount in his hands arising from the sale of said real estate to said John H. Lanan, and the condition of the bond is as follows: "Now, the condition of this ob-

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ligation is such that if the said John H. Lanan, guardian aforesaid, shall, upon his receipt of the proceeds of said sale, faithfully appropriate the same according to law, then the foregoing obligation to be void, otherwise to be and remain in full force."

The guardian, John H. Lanan, drew the money due the wards from the sale of the land in Pennsylvania, and accounted to some of the wards when they became 21 years of age for their share, and converted the portions due the other wards and left the State. The court removed him as guardian and appointed the appellant, Max Jaseph, guardian of the wards whose money had been appropriated by Lanan, and the appellant brought this suit on the second bond for the amount due the wards and received by Lanan from the sale of the land and interest. The appellee Bressett answered, setting up the facts in regard to the appointment of Lanan as guardian, the giving of the bonds, admitting the receipt and conversion of the money by him, and alleging that Mitchell and Naylor, sureties on the first bond, are solvent, and that no steps have been taken for the collection from them for the money sued for in the appellant's complaint.

A demurrer was filed to this answer and overruled, and exceptions reserved. The appellees, Mitchell and Naylor, filed a like answer, which was demurred to, and the demurrer overruled and exceptions reserved. These rulings are assigned as error, and are the only alleged errors which we can consider.

These rulings present the question as to whether or not the guardian can in the first instance maintain a suit on the second bond for the money so converted by the guardian without having first exhausted the first bond. It is manifest, we think, that the second bond was not given as subsidiary to or as security for the first bond, but was given as a primary security for the money to be received. The giving of the second bond did not annul the first, but was ad-

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ditional security, both bonds continuing and both liable as security for the money received by the guardian, and taking, as we do, this view of the case, the question is settled by the decision in the case of *Allen v. State, ex rel.*, 61 Ind. 268. In that case the court says: "So, if there should be separate bonds, given with different sureties, and one bond is intended to be subsidiary to, and a security for, the other, in case of a default in payment of the latter, and not to be a primary concurrent security; in such a case, the sureties in the second bond would not be compellable to aid those in the first bond by any contribution. But, where such intention does not appear, the obligors in the second bond, as we have shown, are liable for breaches of it, either in a separate suit upon such bond or in a joint suit against them and the obligors in the first bond, upon both bonds; and it is not necessary in this case that we inquire which, for the appellants were clearly liable upon the second bond, as a 'primary concurrent security.'" "

In the case at bar there is nothing whatever to indicate any intention to make the last bond subsidiary to the first bond, but, on the contrary, on the face of the bond it appears to have been given as primary security for the money to be received from the sale of the land in Pennsylvania. In this respect it is even stronger in support of the holding that it is a primary security than was the bond in the case of *Allen v. State, ex rel.*, *supra*, and the case at bar clearly comes within the rule laid down in that case, and which we think is the true one.

In view of the conclusion we have reached, it follows that the court erred in overruling the demurrers to the answer.

Judgment reversed, with instructions to the circuit court to sustain the demurrers to the answer of the appellees.

Filed October 14, 1892.

Slaughter *et al.* v. The State, *ex rel.* Mitchell, Auditor.

No. 15,880.

**SLAUGHTER ET AL. v. THE STATE, EX REL. MITCHELL,
AUDITOR.**

MORTGAGE.—*School Fund.—Satisfaction of by Auditor Without Payment to Treasurer.—Purchaser in Good Faith.*—Where the amount due on a school fund mortgage was paid to the county auditor, who appropriated the same to his own use, and never paid any part of the same into the treasury of the county, a purchaser, in good faith, of the land, who paid full value therefor without any knowledge whatever that the loan had not in fact been paid, had a right to rely upon the satisfaction of said mortgage as it appeared in the recorder's office, without an examination of the offices of the treasurer and auditor. Finding the school fund mortgage satisfied by the proper county officers, the only persons who could satisfy the same, the purchaser had the right to presume, without looking further, that the county auditor had proceeded regularly, and that the mortgage debt had in fact been paid to the county treasurer before said satisfaction was entered.

PUBLIC OFFICERS.—*Acting Within Scope of Duty.—State Bound Thereby.*—The State, as well as municipal corporations, is bound by the acts of its officers, when they act within the scope of their authority.

From the Hancock Circuit Court.

W. R. Hough, for appellants.

E. Marsh and *W. M. Cook*, for appellee.

COFFEY, J.—The material facts in this case, as they appear by the special findings of the circuit court, are that, on the 15th day of March, 1882, Francis M. Jackson borrowed of the auditor of Hancock county the sum of three hundred dollars of the school funds of the State, and executed his note therefor. On the same day he and his wife executed a mortgage upon the land in controversy to secure the payment of the note, which mortgage was duly recorded. The land was subsequently conveyed, until William R. Blakely became the owner of the same, and while such owner, on the 26th day of March, 1885, he paid to the auditor of Hancock county the full amount due on the note and mortgage. The

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auditor thereupon endorsed on the mortgage his certificate that the mortgage had been fully paid and satisfied, and signed and attested such certificate, attached the seal of his office thereto, and surrendered the note and mortgage to Blakely. Blakely caused the certificate of satisfaction to be duly and properly entered of record by the recorder of the county on the record of said mortgage in his office. On the day of such payment the auditor also entered on the register of loans kept by him as such auditor, in his office, a statement that the loan in question was fully paid and satisfied. The appellant Slaughter subsequently purchased the land, relying on the record that the school fund mortgage had been paid and satisfied, and in good faith paid full value therefor without any knowledge whatever that the loan had not, in fact, been paid. The auditor appropriated the money to his own use, and never paid any part of the same into the treasury of the county.

It is conceded by the appellant that the loan was never in fact paid; while, on the other hand, it is conceded by the appellee that the appellant is a purchaser in good faith, without any actual knowledge of the fact that such loan had not been paid.

This being a suit to foreclose the school fund mortgage, the question presented for our consideration and decision relates to the right of the appellant to hold the land in controversy discharged of and free from the mortgage lien.

Section 4388, R. S. 1881, provides that "All loans refunded and all interest shall be paid to the county treasurer, and his receipt shall be filed with the county auditor, who shall give the payer a quietus therefor, and make proper entries."

Section 4389 provides that "Whenever the amount due on any mortgage shall be paid, and the treasurer's receipt therefor filed, the auditor shall indorse on the note and mortgage that the same has been fully satisfied, and surrender the same to the person entitled thereto; and, on production of

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the same thus indorsed, the recorder shall enter satisfaction upon the record."

It is contended by the appellee that the auditor had no power to enter the mortgage satisfied until the money was actually paid to the county treasurer and his receipt therefor filed with such auditor, and that an entry of satisfaction without the existence of such payment and receipt was a nullity, and was the same as a forgery.

It is further contended that the office of the county treasurer and the office of the county auditor are public offices, and that an examination of such offices would have disclosed the fact that the mortgage had not, in fact, been paid, and inasmuch as the appellant did not examine these offices he was guilty of negligence, and should not be protected.

We think the entry of satisfaction by the auditor of Hancock county upon the school fund mortgage in question stands upon a different footing from a forged entry. A forged entry would be without any authority whatever, while the entry under consideration is genuine, and made by an officer having authority to make it. The statute above set out expressly confers such authority upon the county auditor.

It is true that the entry of satisfaction before the payment of the money to treasurer was wrongful, but inasmuch as the auditor had the money in his hands ready to hand over to the treasurer, there was no want of authority. There being present in the county auditor the power to satisfy the school fund mortgage, the question arises as to whether the appellant had the right to rely upon such satisfaction as it appeared in the recorder's office without an examination of the offices of the treasurer and auditor. As a rule the evidence of title and of recorded liens is to be found in the county recorder's office. Judgments rendered in court constitute one exception to the rule.

By reason of the statute, which declares that school fund mortgages shall be deemed recorded from the date of their execution, they seem to constitute another exception. *Dem-*

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ing v. State, ex rel., 23 Ind. 416; *Stockwell v. State, ex rel.*, 101 Ind. 1.

The satisfaction entered by the auditor upon the mortgage was properly recorded by the county recorder, and an examination of records in his office disclosed an unincumbered title to the land in dispute.

We think the appellant had the right to rely upon such records. The general rule is that a public officer is presumed to have done his duty, and until the contrary is shown he is presumed to have acted rightfully. *Mechem Public Offices and Officers*, sections 579-677.

This author says: "The law constantly presumes that public officers charged with the performance of official duty have not neglected the same, but have performed it at the proper time and in the proper manner." Section 579, *supra*.

Finding the school fund mortgage satisfied by the proper county officers, the only persons who could satisfy the same, we think the appellant had the right to presume, without looking further, that the county auditor had proceeded regularly, and that the mortgage debt had in fact been paid to the county treasurer before such satisfaction was entered.

The county auditor, in the most solemn manner, attested by the seal of his office, had published to the world that the debt was paid, and the appellant, in our opinion, was under no more obligation to make further inquiry than he would have been had the mortgage debt been payable to a private individual who had entered the mortgage satisfied. The county auditor was the agent of State, clothed with power to make such satisfaction, and the State, we think, is bound by his acts. The general rule is that the State, as well as municipal corporations, is bound by the acts of its officers when they act within the scope of their authority. *Dillon Municipal Corporations*, note pages 321, 322; *Mechem Public Offices and Officers*, section 842; *Martel v. City of East St. Louis*, 94 Ill. 67; *Roby v. City of Chicago*, 64 Ill. 447; *Board, eto., v. City of Lincoln*, 81 Ill. 156; 2 *Herman Estoppel* and

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Res Adjudicata, 1264; Bigelow Estoppel (5th ed.), 598; *Ournen v. Mayor, etc.*, 79 N. Y. 511; *O'Leary v. Board, etc.*, 93 N. Y. 1; *People v. Stephens*, 71 N. Y. 527.

In our opinion, under the facts found by the court, the appellant Slaughter took the land in dispute freed from the lien of the school fund mortgage in suit.

We may remark, in passing, that this is not a question of loss to the common school fund. If the State is unable to collect the funds from the mortgagors the law makes it the duty of Hancock county to refund the amount lost by the act of its unworthy county auditor.

Judgment reversed, with directions to the circuit court to restate its conclusions of law, and to render judgment thereon in favor of the appellant, Samuel B. Slaughter.

Filed Oct. 12, 1892.

No. 15,743.

MILLER v. BURKET ET AL.

INJUNCTION.—Interlocutory Order in Vacation.—Appeal to Supreme Court.—

When and how Bond may be Filed.—When an appeal is prosecuted to the Supreme Court from an interlocutory order of injunction granted in vacation, and the *nisi prius* judge made an order granting the appeal, and directed that a bond be filed, fixing the penalty of the bond, and the time within which it should be filed, and the record shows the filing of a bond in the prescribed penalty within the time limited, and that it was approved by the clerk as in other cases of appeals taken in vacation, the appeal is properly taken. See section 646, clause 3, and 647, R. S. 1881.

SAME.—Threatened Trespass.—Complaint.—Insufficiency of Averments.—When all the averments of a complaint seeking an injunction, taken together, charge a mere threatened trespass, continuous only in a limited sense, as in the case at bar, continuing only long enough to cut and remove the wheat mentioned in the complaint, and there is no averment of the insolvency of the defendant, there is not a sufficient showing to authorize the granting of an injunction. From anything appearing in the

132	469
138	273
132	469
147	282
132	469
d153	370
132	469
158	240
160	332
132	469
164	33
164	320

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complaint, the defendant may be amply able, pecuniarily, to respond in damages, and no injury is shown to be threatened for which ample compensation may not be made in damages.

PLEADING.—How Construed.—Isolated Averments.—A pleading must be construed in accordance with its general scope and tenor, regardless of isolated averments.

From the Cass Circuit Court.

D. C. Justice, D. H. Chase and D. D. Fickle, for appellant.
M. Winfield and J. C. Nelson, for appellées.

MCBRIDE, C. J.—Appeal from a temporary injunction granted in vacation. The complaint alleges that the plaintiff was the owner, and in the quiet and peaceable possession of certain land, on which was growing at a certain date eighty-three acres of wheat. "That on the 30th day of June, while this plaintiff was thus in the quiet and peaceable possession of said land, and while he was engaged in cutting said wheat the defendants, without right and with force and arms, tore down the plaintiff's fences, and entered upon said premises unlawfully and interfered with the plaintiff and the men whom he had employed and his teams, in their aforesaid lawful occupation of harvesting and cutting said wheat, and commenced cutting down the same, denying the right of this plaintiff so to do, with threats of personal violence and force, drove into the field; that it is now at the season of the year when said wheat should be cut and harvested, and if the plaintiff and his men are thus interfered with and prevented, said wheat will be utterly destroyed and entirely lost; that said defendants have likewise torn down the fences on the public highway and opened up said fields to the public, endangering the destruction of said wheat by cattle that may be straying along the highway; and the defendants unlawfully claim the right at all times and from day to day to tear down the fences and to enter the plaintiff's premises; that the plaintiff, as the owner of said land, in the lawful possession thereof, is entitled under the law to have his possession protected, and should be allowed to ex-

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ercise his rights as the owner of said lands and in the possession thereof, free and undisturbed; and that by reason of the violent conduct of the defendants it was an impossibility for him to protect his possession, and enjoy his aforesaid freehold without resort to violence and bloodshed, which he desires to avoid; that for this reason, and in order that he may not be disturbed in the quiet and peaceable possession of his said lands, it is necessary that a restraining order should be granted, and the defendants and each one of them be enjoined from interfering by force and violence, and leave the possession of his lands, and that he may be allowed to harvest his aforesaid crop of wheat without disturbance and delay; that there is an immediate necessity for the issuing of the restraining order, as before a hearing can be had upon notice they will continue to disturb the plaintiff's fences and prevent the plaintiff and his men from harvesting said wheat, whereby the same may become worthless and entirely destroyed. Wherefore," etc..

The appellant insists that the facts averred are not sufficient to justify the court in granting a temporary injunction. In approaching this question we meet the contention of the appellee that there has been no appeal within the meaning of the statute, and hence, there is no case properly before us. The statute provides that appeals may be prosecuted to this court from an interlocutory order of injunction granted in vacation. Section 646, R. S. 1881, clause 3. Section 647 provides that when the injunction is granted in vacation "The appeal may be taken at the time or during the next term. The appeal shall not be granted until the appellant has filed an appeal bond, as in other cases of appeal."

The only entries in the record relating to the appeal are as follows: July 8, 1890, the following entry was made: "Come again the parties, and the court having heard the evidence, and being fully advised in the premises, it is ordered that the restraining order herein be continued until the further order of the court, from which interlocutory

order the defendants pray an appeal to the Supreme Court, which is granted upon filing an appeal bond in the sum of \$200, and twenty days' time is allowed defendants to file appeal bond and bill of exceptions." * * * * *

Under date of July 19 the following appeared :

"And afterward, to wit: on the 19th day of July, 1890, the defendant, Henry Newton Miller, filed in the office of the clerk of the Cass Circuit Court his appeal bond in said cause, which is in words and figures following, to wit": Then follows a copy of appeal bond, which the record shows was "taken and approved" by the clerk of the court on that day. The position of the appellee is that as the appeal in such cases is not governed by the general statute relating to appeals, but by special statutory provisions, there must be strict compliance with all such provisions or there is no appeal. Counsel say: "We therefore conclude that before there can be an appeal from the granting of a temporary injunction, either in term time or in vacation, the court or judge must fix the amount of the bond, the bond must be approved by the court or judge, or time must be taken to file a bond, the sureties being named, and the court or judge must approve the sureties." The question was properly presented, and at the proper time by a motion to dismiss, so that there is no waiver.

Section 646, *supra*, which authorizes appeals from interlocutory orders, provides that such appeals may taken in several classes of cases.

In some of them the filing of a bond has the effect of staying the operation of the order or judgment of the court below. This, however, is not true of an order of injunction. Such an order continues in operation and in force notwithstanding the appeal, and notwithstanding the filing of a bond. *State, ex rel., v. Chase*, 41 Ind. 356; *Central Union Telephone Co. v. State, ex rel.*, 110 Ind. 203; *Walls v. Palmer*, 64 Ind. 493; *Randles v. Randles*, 67 Ind. 434; *Alderman v. Wilson*, 111 Ind. 255.

Parties can only be relieved from the operation of an in-

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junction by a special supersedeas, which may be granted by the appellate tribunal upon proper showing.

This being true, the appellant contends that the provision above quoted from section 647, *supra*, relative to the filing of bonds, must be construed as applying only to those cases where a bond can have the effect of staying the operation of the order appealed from.

In this we can not agree with him. The filing of a bond is by the Legislature made necessary to the granting of the appeal. Why they have done so we need not inquire. It is enough to know that the statute is too plain to leave room for construction. The filing of an appeal bond is an essential to the granting of all appeals under the section in question. The concluding phrase of the section, "as in other cases of appeal," relates to the time and manner of filing and approval of the bond.

We are, however, of the opinion that in this case there was substantial compliance with the statute. The statute, it is true, says that the appeal shall not be "*granted*" until the appellant has filed an appeal bond, etc. This means no more than that the appeal shall not become effectual until the bond has been filed. The bond is to be filed "as in other cases of appeal." The appeal in this case is taken in vacation from a vacation order. In other cases of appeal, taken in vacation, while the court or judge making the order granting the appeal directs the giving of bond, etc., the clerk, either of the Supreme or Circuit Court, may approve the bond and surety. Sections 641 and 642, R. S. 1881.

In the case at bar the judge made an order granting the appeal and directing that a bond be filed, fixed the penalty of the bond and the time within which it should be filed.

The record shows the filing of a bond in the prescribed penalty within the time limited, and that it was approved by the clerk as in other cases of appeal taken in vacation. This was sufficient, and the appeal is properly before us.

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This brings us to the consideration of the sufficiency of the facts pleaded to justify the granting of an injunction.

An injunction will never be awarded to restrain the commission of a mere trespass, where it is not shown that the threatened injury will be irreparable, and that full and adequate compensation can not be had in an action at law. *Whitlock v. Consumers', etc., Co.*, 127 Ind. 62; *Anthony v. Sturgis*, 86 Ind. 479; *Caskey v. City of Greensburgh*, 78 Ind. 233; *Indianapolis, etc., Co. v. City of Indianapolis*, 29 Ind. 245.

An injunction will, however, be awarded to prevent a threatened continuous disturbance of the possession of the rightful owner of land. *Owens v. Lewis*, 46 Ind. 488; *Penoe v. Garrison*, 93 Ind. 345.

Such a case, the appellees insist, is made by the averments of the complaint. They base their claim upon the averment that "the defendants unlawfully claim the right, at all times, and from day to day, to tear down the fences and to enter the plaintiff's premises." Standing alone, this averment seems to justify their contention. In construing a pleading, however, all of its averments must be taken together. This accords with the familiar rule that a pleading must be construed in accordance with its general scope and tenor, regardless of isolated averments. *Platter v. City of Seymour*, 86 Ind. 323; *Louisville, etc., R. W. Co. v. Thompson*, 107 Ind. 442 (458); *Henry v. Stevens*, 108 Ind. 281.

Construing together all of the averments of the complaint, it becomes clear that the particular averment in question refers alone to the claim by the defendants of a right to enter and cut the wheat in controversy. It is not averred that the appellant asserted any interest in or right to the land, other than the right to break the close and enter upon it, and is apparent that the right thus asserted was only for the purpose of cutting and removing the wheat.

Every other averment of the complaint relates to the controversy over the wheat, and no rule of construction will

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justify us in holding that this isolated averment is intended to assert generally a claim by the appellant of a right apart from the subject-matter of the immediate controversy.

The complaint, therefore, charges a mere threatened trespass, continuous only in a limited sense; that is, continuing long enough to cut and remove the wheat. There is no averment of the insolvency of the appellant. From anything appearing in the complaint he may be amply able pecuniarily to respond in damages, and no injury is shown to be threatened for which ample compensation may not be made in damages.

We find nothing in the complaint sufficient to authorize the granting of an injunction.

The judgment is reversed, at the appellees' costs.

Filed Oct. 26, 1892.

No. 15,649.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY
v. HAMMOND.

132	475
141	362
132	475
150	147

RAILROAD.—*Right of Way.*—*Condemnation Proceedings.*—*Awards.*—*Liability for by Those Succeeding to the Rights of the Corporation.*—Where the appellant had acquired the property, rights and franchises of a railroad corporation which had condemned land for a right of way, and the appellant entered upon, used and occupied the land for the purposes for which it was condemned, it must be held to have adopted the original appropriation, and having adopted and ratified such appropriation, it is bound in equity to compensate the owners for the land thus taken, and it is bound by the judgment in the condemnation proceedings against the corporation, through which it takes its title.

STATUTE OF LIMITATIONS.—*Six Years' Limitation Does not Run Against Judgments.*—The six years' statute of limitations does not run against a suit on the award and judgment of a court.

EVIDENCE.—*Intention of Attorney.*—The purpose and intention of an attorney in prosecuting a suit are not admissible in evidence.

SAME.—*Deposition.*—*Striking out Remote and Immaterial Matter.*—It is not

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error to strike matter out of a deposition which is too remote and wholly immaterial.

JUDGMENT.—*Finding in Specific Sum.*—The finding of the court for the plaintiff in a specific sum is not objectionable, as the specific amount is essential to enable the plaintiff to collect the money.

From the Carroll Circuit Court.

J. B. Peterson, J. C. Nelson, Q. A. Myers and M. D. Fansler, for appellant.

D. C. Justice and L. Walker, for appellee.

COFFEY, J.—The following material facts in this cause are alleged in the complaint. In the year 1881 The New York, Chicago and St. Louis Railway Company condemned and appropriated, by process of law, certain described land in Porter county, belonging to George H. Hammond and Marcus Towle, for the right of way for its road bed, side tracks and water tanks. Without the payment of the awards for damages it took possession of the land so condemned and appropriated and constructed its road over the same.

Towle assigned and transferred his interest in the awards to Hammond, who in like manner transferred the whole of the awards to appellee. Prior to the condemnation and appropriation above mentioned the railway company had executed a mortgage to the Central Trust Company of New York, to secure the payment of a large amount of bonds executed by the company. In the year 1887 the mortgage was foreclosed and the property of the railway company sold under such decree of foreclosure. By means of this sale, and various transfers and consolidations of railroad companies, the appellant became the owner of all the property, rights and franchises of The New York, Chicago and St. Louis Railway Company, and now owns and holds the same. The appellant is now and has been ever since it became the owner of the property in the possession of the lands condemned and appropri-

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ated, using it for the purposes for which it was appropriated. It is alleged that The New York, Chicago and St. Louis Railway Company is insolvent.

To the complaint setting forth the foregoing facts the court overruled a demurrer filed on behalf of the appellant.

In addition to the general denial the appellant answered:

Second. Payment.

Third. The two years' statute of limitations.

Fourth. The six years' statute of limitations.

Fifth. That prior to the act of filing the instrument of appropriation Hammond and Towle and The New York, Chicago and St. Louis Railway Company, for mutual considerations moving between them, agreed that the construction and location of the line of road, as set up in the answer, should be a full payment and discharge of the awards to be made thereafter; that such award was to be made to give others interested an idea of the value of the land so to be given by Hammond and Towle, the then owners of the land; that the railway company fully performed all the conditions and stipulations of said agreement on its part.

The court sustained a demurrer to the third and fourth paragraphs of the answer, and issues being joined, a trial of the cause, by the court, resulted in a finding and judgment for the appellee.

It is insisted by the appellant that the circuit court erred:

First. In overruling its demurrer to the complaint.

Second. In sustaining a demurrer to its fourth paragraph of answer.

Third. In overruling its motion for a new trial.

We are of the opinion that the court did not err in overruling the demurrer of the appellant to the complaint. When the appellant, upon acquiring the property, rights and franchises of the corporation condemning the land

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for right of way, entered upon, used and occupied the land for the purposes for which it was condemned, it must be held to have elected to adopt the original appropriation. Having adopted and ratified such appropriation it is bound in equity and good conscience to compensate the owners for their land thus taken. It is bound by the judgment against the corporation through which it takes its title, and must pay for the land the price fixed by the award and judgment in the proceedings to condemn. Indeed the question now under discussion does not seem to be an open one in this State. *Lake Erie, etc., R. W. Co. v. Griffin*, 92 Ind. 487; *Lake Erie, etc., R. W. Co. v. Griffin*, 107 Ind. 464.

It is conceded by the appellant that the court did not err in sustaining a demurrer to the third paragraph of the answer, but it is insisted that the court erred in sustaining a demurrer to the fourth paragraph setting up the six years' statute of limitations. We do not think the court erred in sustaining a demurrer to this answer.

The purpose of this action, as we understand it, was to enforce the award and judgment of the court rendered in the condemnation proceedings against the appellant upon the ground that it had adopted and ratified such award and judgment.

To such an action the six years' statute of limitations has no application.

Issue was joined on the fifth paragraph of the answer, and a trial of that issue resulted in a finding and judgment against the appellant. We can not say that the evidence was of such a character as to preclude such a finding and judgment. The burden of the issue was upon the appellant, and after a careful reading of the evidence we are not prepared to adjudge that the finding of the circuit court has no evidence to support it.

Nor do we think the court erred in refusing to allow Mr. Peterson to testify as to his purpose and intention in

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bringing the condemnation proceedings under which the award and judgment in question were made. The agreement, if any was made, between the company instituting the proceeding and the owners of the land to be condemned was material, but the private intention of the attorney who prosecuted the proceeding could not, by any possibility, we think, throw any light upon the questions in issue between the parties to this suit. All the facts in relation to the controversy, known to the witness, were fully stated by him, and the case does not belong to that class in which the intentions of the party are material.

The court did not err in striking out parts of the deposition of James M. Young. The matter struck out and suppressed was too remote, and was wholly immaterial.

Finally, it is insisted by the appellant that the finding of the circuit court to the effect that the appellee was entitled to a judgment for a given sum is clearly erroneous.

The finding, we think, is unobjectionable.

As a basis for either a judgment or decree which would enable the appellee to collect the money, due it for land appropriated, it was necessary to find the amount due. The court found that a sum equal to the original awards with the interest thereon was due the appellee. The question as to whether the court should have rendered a decree or a personal judgment is not before us for the reason that no objection was made to the form of the judgment in the circuit court. *City of Greenfield v. State, ex rel.*, 113 Ind. 597.

After a careful examination of all the questions discussed by counsel in their able briefs, we have been unable to find any error for which the judgment should be reversed.

Judgment affirmed.

Filed October 13, 1892.

 Batman v. Snoddy.

No. 15,940.

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132	480
132	485
132	491
133	497
133	490
142	311

132	480
169	643
169	644

DEED.—*Procuring of by Fraud.*—*Action to Recover Damages.*—*Unsoundness of Mind of Grantor.*—*Complaint.*—In an action to recover damages on the ground that a deed was procured by fraud, a paragraph of complaint is bad which proceeds upon the theory that the intestate, at the time of the execution of the deed, was by reason of age and infirmity of unsound mind, and that he would not have executed the same had he been of sound mind, but which fails to state any facts showing that the intestate was of unsound mind at that time or incapable of contracting.

SAME.—*Instruction to Jury.*—An instruction to the jury that "if you find from the evidence that S. was, at the date of making said deed, a person of sound mind and capable of transacting his business you will find for the defendant," contained a correct statement of the law.

SAME.—*Conveyance to Son.*—*Gift.*—A person of sound mind may convey his land to his son for a lawful consideration, or as a gift if he desires.

PLEADING.—*Proceeding Upon Different Theories.*—*Right of Court to Choose.*—If a paragraph of complaint proceeds upon more than one theory, the court has the right to construe the paragraph as proceeding upon the theory most apparent and most clearly outlined by the facts stated and require the case to be tried upon one definite theory.

From the Monroe Circuit Court.

J. H. Loudon, W. P. Rogers, H. C. Duncan, J. R. East
and *W. H. East*, for appellant.

R. A. Fulk and E. Corr, for appellee.

OLDS, J.—The appellant's intestate was the owner of a tract of land in his lifetime, which he conveyed to his son, William H. Snoddy, the appellee. The appellant filed his complaint in this action in two paragraphs. A demurrer for want of facts was sustained to the first and overruled as to the second paragraph. Appellant excepted to the ruling in sustaining the demurrer to the first paragraph. Issues were joined on the second paragraph, and a trial had resulting in a finding and judgment for appellee. A motion for a new trial was filed and overruled, and exceptions taken. Errors are assigned and discussed on the rulings of the court in sustaining the demurrer

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to the first paragraph of the complaint and overruling the motion for a new trial.

By each paragraph of the complaint the appellant seeks to recover damages on the ground that the deed was procured by fraud.

The second paragraph proceeds upon the theory that the intestate, at the time of the execution of the deed, was, by reason of age and infirmity, of unsound mind, and that the deed was procured by fraud, and that he would not have executed the same had he been of sound mind.

The first paragraph proceeds upon the same theory, but no facts are stated showing that the intestate was of unsound mind or incapable of contracting, and the paragraph is clearly bad and the demurrer to it was properly sustained. The only reason assigned that the ruling on the motion for new trial is erroneous is the giving of the tenth instruction, as follows :

“10. If you find from the evidence that Samuel Snoddy was at the date of making of said deed, September 28, 1887, a person of sound mind and capable of transacting his business you will find for the defendant.”

This instruction was correct. It is urged on the part of counsel for appellant that there are two causes of action stated in the second paragraph and that the paragraph proceeds upon two theories, one that the intestate was so aged and enfeebled in body and mind that he was subject to the influence of his son, and that he was so influenced by the fraud of the appellee to execute the deed ; also, that it states a cause of action on the grounds that he, the intestate, was of unsound mind and incapable of contracting or making a deed. We fail to discover the distinction, and even if such a distinction existed as that the paragraph stated facts making it good upon either theory, as contended by counsel, the court had the right to construe the paragraph as proceeding upon the theory

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which was most apparent and most clearly outlined by the facts stated and require the case tried upon one definite theory. If parties desire to present a cause of action on different theories they must plead in separate paragraphs, confining each paragraph to a distinct theory.

If the intestate was of sound mind when he made the deed he had the right to convey his land to his son for any lawful consideration, or as a gift if he so desired. *First National Bank of Indianapolis v. Root*, 107 Ind. 224; *Louisville, etc., R. R. Co. v. Thompson*, 107 Ind. 442; *Henry v. Stevens*, 108 Ind. 281; *Chicago, etc., R. R. Co. v. Bills*, 104 Ind. 13; *Purcell v. English*, 86 Ind. 34; *Bremmerman v. Jennings*, 101 Ind. 253; *Weis v. City of Madison*, 75 Ind. 241; *Bingham v. Stage*, 123 Ind. 281.

There is no error in the record.

Judgment affirmed with costs.

Filed Oct. 26, 1892.

No. 16,007.

MONNETT ET AL. v. TURPIE ET AL.

EQUITY.—*Action for Cancellation of Conveyance.*—*Trial by Jury.*—An action to have certain conveyances cancelled and the title revested in the grantor on the ground that at the date of their execution the grantor was of unsound mind and that the conveyances were procured by fraud and without consideration would, prior to the 18th day of June, 1852, have fallen within the exclusive jurisdiction of a court of equity, and it was not error to refuse to grant a trial by a jury. Section 1064, R. S. 1881.

SAME.—*Decree Affecting Lands Outside of State.*—In an equitable action, the court having jurisdiction of the person is able, by process against the defendants *in personam*, to enforce its decree affecting land without, as well as within the State.

PLEADING.—*How to be Construed.*—The nature of an action must be determined from the general character and scope of the pleading, disregarding isolated and detached allegations not essential to the support of its

132	482
142	341
132	482
146	295

132	482
158	240
132	482
164	32

132	482
169	643

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main theory, and must be construed as proceeding upon the theory which is most apparent and most clearly outlined by the facts stated. Such a construction should be given as will give full force and effect to all of its material allegations and as will afford the pleader full relief for all injuries stated in his pleading.

From the Carroll Circuit Court.

E. P. Hammond, M. F. Chilcote and W. B. Austin, for appellants.

L. Walker and W. B. McClintic, for appellees.

MILLER, J.—The action of the court in refusing to grant the appellant a trial by jury is the only question involved in this appeal.

The complaint consisted of three paragraphs.

The first paragraph shows that on and prior to January 5, 1881, Thomas Monnett was the owner of several distinct tracts of land in Carroll and White counties, Indiana, and in Prairie county, in the State of Arkansas; that he was, and for a long time prior thereto had been, a person of unsound mind, of which the defendants had notice; that on that day, with full knowledge that he was of unsound mind, the defendants, James H. Turpie and William Turpie, fraudulently and without consideration, induced him to convey to them, by certain instruments of writing, purporting to be warranty deeds, all said real estate.

That on the 23d day of June, 1881, the said Thomas Monnett was, on inquest duly had, declared to be a person of unsound mind and incapable of managing his own estate, and a guardian of his person and estate appointed; that on the 4th day of April, 1883, the guardian demanded a reconveyance of all said lands to the said ward, at the same time tendering them for execution a conveyance to that effect; that they refused, and still refuse, to execute the same.

Subsequently Thomas Monnett died, and by supple-

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mental complaint his heirs were substituted as plaintiffs. The prayer for relief is:

"Wherefore, the plaintiff prays the court for a judgment disaffirming the said deeds to said defendants, James H. Turpie and William Turpie, and cancelling the same, and that the title to said lands by the decree of the court be revested in the plaintiff freed and discharged from all claims of the said defendants, and each of them, and for such other relief as may be equitable and just."

The other paragraphs of complaint, in so far as they affect the question involved, do not differ from the first.

The appellants, after the inquest of lunacy and disaffirmance of the conveyances, had their election to pursue either one of two courses:

1. To treat the conveyances as having been avoided by the disaffirmance, and if out of possession sue in ejectment, or to quiet title. *Brown v. Freed*, 43 Ind. 253; *Freed v. Brown*, 55 Ind. 310; *Nichol v. Thomas*, 53 Ind. 42; *Long v. Williams*, 74 Ind. 115.

2. Proceed in equity to have the conveyances cancelled and the title revested in the grantor (1 Pomeroy Eq., section 110); in which case the chancery court having jurisdiction of an essential part of the case the whole is drawn into equity. *Towns v. Smith*, 115 Ind. 480; *Quarl v. Abbett*, 102 Ind. 233; *Lake v. Lake*, 99 Ind. 339.

To determine which of these courses the appellants elected to pursue is to determine their right to a trial by jury. If the complaint is an action to quiet title as provided by our code, section 1070, the action was triable by jury and the court erred in refusing, upon appellant's motion, to submit the cause to a jury for trial. *Puterbaugh v. Puterbaugh*, 131 Ind. 288; *Trittipo v. Morgan*, 99 Ind. 269; *Johnson v. Taylor*, 106 Ind. 89; *Kitts v. Willson*, 106 Ind. 147.

If, on the contrary, the action was for the cancellation

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of the deeds it was one that, prior to the 18th day of June, 1852, would have fallen within the exclusive jurisdiction of a court of equity, and was triable by the court. Section 1064, R. S. 1881.

The nature of the action must be determined from the general character and scope of the pleading, disregarding isolated and detached allegations not essential to the support of its main theory. *First National Bank, etc., v. Root*, 107 Ind. 224; *Cottrell v. Aetna L. Ins. Co.*, 97 Ind. 311; *Bingham v. Stage*, 123 Ind. 281; *City of Ft. Wayne v. Hamilton*, *post*, p. 487.

The court will construe the pleading as proceeding upon the theory which is most apparent and most clearly outlined by the facts stated. *Batman v. Snoddy*, *ante*, p. 480.

The complaint will, if possible, be given such construction as to give full force and effect to all of its material allegations and such as will afford the pleader full relief for all injuries stated in his pleading.

We have arrived at the conclusion that the complaint must be regarded as a complaint for equitable, rather than legal relief. The complaint is destitute of some of the allegations found in an ordinary complaint to quiet title (*Miller v. City of Indianapolis*, 123 Ind. 196), and contains much that is unusual and unnecessary in such actions.

While the nature of the action must be determined from the substantive facts pleaded and not from the prayer for relief (*Martin v. Martin*, 118 Ind. 227), the statement of the relief demanded may be looked to, in connection with the other averments. *Galway v. State, ex rel.*, 93 Ind. 161.

The primary object of the action seems to have been the cancellation of the conveyances. The vague and uncertain relief asked for, the revesting of the title in the grantor, freed of the claims of the defendants, is insufficient to give character to the pleading.

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There is, however, another element in the case which, beyond question, characterizes the action as one for equitable relief; that is the fact that conveyance of the real estate situate in the State of Arkansas is set forth and made a material part of the complaint. This real estate being situate in another State wholly beyond the jurisdiction of the courts of this State to quiet the title thereto conclusively shows that that was not the object of the suit. We could not presume that the plaintiff instituted an action upon a particular theory when, according to that theory, a material and substantial portion of the subject-matter of the action was wholly without the jurisdiction of the court, if another theory equally sustained by the facts pleaded and relief demanded, would bring the whole subject-matter of the action within its jurisdiction.

If the action was in equity, the court, having jurisdiction of the person, was able by process against the defendants *in personam* to enforce its decrees affecting the land without, as well as within, the State. *Coon v. Cook*, 6 Ind. 268; *Dehart v. Dehart*, 15 Ind. 167; *Bethell v. Bethell*, 92 Ind. 318; 1 Pomeroy Eq., section 135.

The appellants having elected to proceed in equity, they thereby deprived themselves of the privilege of submitting their cause to a jury for trial.

We find no error in the record.

Judgment affirmed.

Filed Nov. 3, 1892.

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No. 15,855.

THE CITY OF FORT WAYNE v. HAMILTON ET AL.

132	487
132	486
133	427
132	487
134	532

MUNICIPAL CORPORATION.—*Wrongful Appropriation of Land for Streets.—Liability for Tort.*—Where a city wrongfully took possession of the plaintiff's land and permanently appropriated and used it for a street, it is liable as a tort-feasor for taking possession of private property without complying with the charter under which it is incorporated.

SAME.—*Permanent Injury.—Measure of Damages.—Mode of Computing.*—Where the injury complained of is permanent, and the complaint recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to succeed to the plaintiff's title to the property, damages may be assessed upon the basis of its value. In arriving at the amount of damages, it was proper for the jury to deduct the value of the property with the improvement from its value without the improvement.

SAME.—*Loss of Benefits.*—If the city lost the benefit of having the benefits to other land-holders on account of the opening of the street assessed against them, it was the result of its own failure to proceed according to law, and in no way chargeable to plaintiffs.

SAME.—*Status of Limitations.—Other Action Pending.*—Where the regularity of the proceedings for condemnation, as well as the amount of the damages, was involved in an appeal to the circuit court and the present action for injuries was instituted within two years after the termination of said action, it was instituted in season, as the plaintiffs could not have instituted their suit for injuries until the termination of the other action. A cause of action can not be said to have accrued until such time as the plaintiff can legally institute his action for relief.

PRACTICE.—*Paragraph of Answer.—Striking Out.—Evidence Admissible Under General Denial.—Presumption.*—Where a paragraph of answer is stricken out and the evidence admissible under said paragraph was admissible under the general-denial on file, it will be presumed that this was the ground upon which it was stricken out.

From the Allen Circuit Court.

H. Colerick and W. S. Oppenheim, for appellant.

S. R. Morris, R. C. Bell, J. Morris and J. M. Barrett, for appellees.

MILLER, J.—This was an action brought by the appellees against the appellant to recover for the taking of a strip of land for a street.

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The complaint alleges that the appellant, on the — day of ——— 1873, unlawfully entered upon and took possession of a strip of land, sixty feet in breadth, and extending north and south through the Hamilton homestead in said city, then and ever since the property of the appellees, with the view of extending Clinton street, in said city, through and across said homestead, without the consent and against the will and protest of the appellees; that the appellant proceeded illegally against the will and repeated protests of the appellees, to construct and build a street and sidewalk upon said strip of land, to dig up and remove therefrom the soil, shrubs and shade trees, and permanently to hold, use and occupy said strip of land unlawfully and against the will of the appellees, as one of its public streets. It is alleged that the land so taken, held and used was, at the time, of the value of thirty thousand dollars. It is also averred that while the appellant so unlawfully took, held and used said strip of land the appellees again and again demanded the possession of the same, but that appellant refused to restore to them, or permit them to take possession of the same. It is further averred that before the commencement of this suit, to wit, on the 27th day of September, 1887, the appellees notified the appellant in writing that it could no longer hold and use said strip of land for and as one of its public streets or otherwise, except upon the condition that it pay to the appellees the full value thereof, and that they, the appellees, would regard its further use and occupancy by the appellant as a public street, as an agreement to permanently hold and occupy as its own said strip of land as one of its public streets, and pay to the appellant the full value thereof. It is also averred that after the receipt of said notice, the appellant continued exclusively to hold, use and occupy said strip of land as one of its public streets and as its own property. And the appellees in their complaint offer, upon being paid the value of their land so taken and held, to fully recognize the appellant's right there-

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to, and furnish it such assurance of title as may be just and right.

The appellant demurred to the complaint. Its demurrer was overruled, and an answer in four paragraphs filed, the second of which was subsequently drawn.

The first paragraph of answer was a general denial.

The third paragraph was as follows: "And for a third paragraph of answer to plaintiff's complaint the defendant says that the cause of action of plaintiffs is for the opening of Clinton street in said city of Fort Wayne; that said city began proceedings to have said land condemned and the proper assessment of damages and benefits made as provided by law; that said strip of land was occupied and street opened under such proceedings, but that on appeal, at plaintiff's instance, said proceedings were wholly set aside and held for naught.

"Defendant further avers that the benefits that accrued to the property of plaintiffs through which said Clinton street was thus opened, were in excess of the injuries and damages accruing thereto; that the real estate of plaintiffs on both sides of said strip of land so taken, which was then, and is now, the property of plaintiffs, was benefited in the sum of thirty-five thousand dollars by reason of the taking of the strip of land described in the complaint and opening said street."

The fifth paragraph of answer was the six years statute of limitations pleaded to all of the complaint, except such as seeks to recover for the value of the real estate taken.

A fourth paragraph of answer was filed and held good on demurrer, but it need not be set out or noticed.

To the fifth paragraph of answer the appellees replied:

1st. That the proceedings for the appropriation of the land were continuously pending from the year 1873 until April 2d, 1886, when they were dismissed, and that the suit was begun on the 21st day of November, 1887.

The third paragraph of answer was, on motion of the ap-

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pellees, struck out, and a demurrer to the first paragraph of the reply to the fifth paragraph of answer was overruled.

The cause was tried by a jury, and a verdict and judgment rendered against the appellant.

The errors assigned here are that the court overruled the demurrers to the complaint, and to the reply to the fifth paragraph, and overruled the appellant's motion for a new trial.

In support of the demurrer the appellant contends that cities have no power to purchase land for the opening, extension or enlargement of its streets, and pay for it out of the general funds of the city; that towns and cities can only acquire real estate for street purposes by accepting its dedication, or by pursuing the method provided by statute for its condemnation, and the assessment of damages and benefits; that the statute contemplates that the cost of the opening or extension of a street shall be borne by the property-holders whose lands are benefited by the change, without becoming a charge upon the general revenues of the city; that a city having no right to become the purchaser of land to be laid out into streets, it can not be held liable as upon an implied contract for the payment of the price of land taken for that purpose. In other words, that a city can not be held liable as upon an implied contract in a matter where it has no power to make an express one.

It is also insisted that the title to the premises taken by the appellant is, and must of necessity remain in the appellees, and that their only remedy is to recover its possession and damages for any injury it has sustained, or to have damages assessed against the property benefited as provided by statute.

While there is some confusion in the manner in which the cause of action is stated in the complaint, we are of the opinion that it sounds in tort rather than upon a contract, express or implied. We do not regard the notice served by the appellees upon the city that they would regard the continued occupancy of the ground by the city as an agreement

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to pay them its full value, as the foundation of the cause of action.

The nature of the pleading must be determined from its general character, scope and tenor. *Cottrell v. Aetna Life Ins. Co.*, 97 Ind. 311; *First Nat'l Bank, etc., v. Root*, 107 Ind. 224; *Bingham v. Stage*, 123 Ind. 281; *Pearson v. Pearson*, 125 Ind. 341; *Batman v. Snoddy*, *ante*, p. 480.

The cause of action is predicated upon the wrongful taking or retention of the appellees' property and its permanent appropriation and use for a public street.

Whatever doubts may exist as to the right of a municipal corporation to purchase real estate for its streets or other thoroughfares, there can be none as to its liability as a tortfeasor for taking possession of private property without complying with the charter under which it is incorporated. 2 Dillon Munic. Corp.. section 971.

The appellant's counsel in their brief do not deny the liability of the city for the trespass, in an action of trespass, but insist that a recovery would be limited to direct injuries, and could in no event include the value of the strip of land appropriated. In *Soulard v. City of St. Louis*, 36 Mo. 546, the precise question involved in this case came up for decision. In that case the city, without causing the land to be condemned and appropriated, as provided in its charter, took possession of the plaintiff's land and used it as one of its public streets for the period of about ten years before the commencement of the suit. Before bringing suit the plaintiff signified to the city his willingness to permit the permanent use of the land for street purposes upon the payment to him of the first value of his land. In the course of the opinion it is said: "The whole burden is devolved on the city of taking the initiative to procure the condemnation, and no provision is made by which the value can be ascertained or the quantity of damages assessed by the voluntary action of the owners of the property. Where the Legislature authorizes an act of this kind, the natural and inevit-

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able result of which will be to damage or appropriate the property of another, and at the same time points out the mode, at the election of either party, how these damages can be ascertained and redress obtained, the common law remedy will be taken to be superseded and the statutory remedy exclusive (*Lindelle v. Hannibal, etc., R. R. Co.*, 36 Mo. 543); but where no such remedy is given at the election of the party complaining of the injury, the common law right of action remains unaltered. In this case; the city proceeded to take and appropriate the plaintiff's property without pursuing the mode prescribed in its charter authorizing it to enter upon and use for its own purpose the land of another whenever it should be considered necessary or expedient for the furtherance of the public interests. The act done, then, was without authority of law; it was wrongful, and amounted to a trespass." In speaking of the measure of damages it was said: "In regard to the measure of damages, it has already been prescribed by this court in *Mueller v. St. Louis, etc., R. R. Co.*, 31 Mo. 262, a case involving essentially the same principle. It was there held, on the authority of *Jones v. Gooday, supra*, that in an action for damages for wrongfully entering upon land and taking and carrying away the soil, etc., the proper measure of damages is not the actual damages sustained, but the value of the land removed; and as the defendant has taken and appropriated to its own use the land used as a street, its fair and reasonable value will afford the criterion in estimating the damages."

The court also expresses the opinion that the plaintiff, receiving full value for the land, it would, *ipso facto*, work a dedication thereof to the city. But that question was unimportant, as the plaintiff offered to convey to the city upon the payment of the value of the property.

In *Longworth v. City of Cincinnati*, 48 Ohio St. 637, a case decided during the pendency of this appeal, the action was to recover for a strip of land unlawfully appropriated for a public street without having the damages and benefits assessed

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according to law. The plaintiff in his petition offered to convey the same in fee simple upon payment by the defendant of its value, and consented that a decree might be entered ordering a conveyance in fee simple to the defendant. The court held that where land was appropriated for a street without having the damages assessed and paid, the owner, at his option, might either recover the land, or, where work in the line of street improvement had been done upon the premises, and the occupation of the street by the public would be interrupted, recover the value of the property.

The measure of damages in actions of this kind seems to depend upon the character of the injury. Where the injury is permanent, and the complaint recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to succeed to the plaintiff's title to the property, damages may be assessed upon the basis of its value. Where, however, the action is to recover for past injuries without recognition of the right of the defendant to continue the injury complained of, the recovery will be limited to a compensation for injuries already sustained. *Indianapolis, etc., R. W. Co. v. Eberle*, 110 Ind. 542.

The injury complained of in this case was permanent and destructive. The shrubs, shade trees and soil were removed therefrom and a street and sidewalk constructed, so that it was practically impossible to restore the property to its former condition. In addition to this, the rights of the public demanded its continuance as a public thoroughfare. This brings the case within the rule laid down in *Jones v. Gooday*, 8 M. & W. 146, cited in *Anderson, etc., R. R. Co. v. Kernodle*, 54 Ind. 314, fixing the measure of damages at the value of the land, rather than the amount which would be required to restore it to its original condition.

The appellant cites and strongly relies upon the case of *Paret v. Mayor, etc.*, 40 N. J. L. 333. That was an action of assumpsit for the value of land taken for a public improvement without having the damages and benefits as-

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sessed. The case differs in some respects from the one before us, and also from the cases of *Soulard v. City of St. Louis*, *supra*, and *Longworth v. City of Cincinnati*, *supra*, in this, that no offer to convey the property to the municipality was made; and the suit being by an executor, who had no power to transfer title, no stipulation could be incorporated in the decree to that effect. The reasoning of the case is, however, variant from the two cases referred to, the court holding that the scheme pointed out by the statute of having the damages ascertained is exclusive, and that where that course is not followed the land-owner is remitted to the right of recovering his property with incidental damages as his sole remedy.

In our opinion the better reason and the weight of authority are against the position taken in *Paret v. Mayor, etc.*, *supra*, and we decline to follow it. We, therefore, hold that the court did not err in overruling the demurrer to the complaint.

We do not find it necessary to determine whether or not the court was in error in striking out the third paragraph of answer. The record shows that the court, upon the trial, admitted under the general denial all the evidence that could have been introduced in support of this paragraph. The fact that the evidence was admitted under the general denial would not of itself be sufficient to cure a wrongful holding on the motion to strike out. Elliott's App. Proc., section 638. But as the evidence was admissible under the general denial, we may presume that this was the ground upon which the motion was sustained. The answer to interrogatories submitted to the jury show that the amount of the verdict was arrived at by deducting the value of the property of the appellees, with the improvement, from its value without the improvement. This method of arriving at the damages sustained by the appellees did not differ from that provided by statute regulating the assessment of damages

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and benefits. Davis' Supp., pp. 96, 97, section 3172, R. S. 1881.

If the city lost the benefit of having the benefits to other land-holders, on account of the opening of the street, assessed against them, it was the result of its own failure to proceed according to law, in no way chargeable to the appellees. That was a matter between it and the other land-owners affected by the change in which the appellees were not concerned.

The court did not err in holding the first paragraph of reply to the fifth paragraph of answer good on demurrer.

A cause of action can not be said to have accrued until such time as the plaintiff can legally institute his action for relief. Boswell Limitations, section 27.

Under the statute the regularity of the proceedings for condemnation, as well as the amount of the damages, were involved in the appeal and pending in the court. While this proceeding was pending in the circuit court, an independent action for the recovery of damages for the taking of the property would not lie. *Ney v. Swinney*, 36 Ind. 454; *Pittsburgh, etc., R. W. Co. v. Swinney*, 97 Ind. 586.

The appellees could not institute their action for the injuries complained of until the termination of the action pending. This action was brought within less than two years from the time the cause of action accrued.

The evidence sustains the verdict of the jury. We find no error in the record.

Judgment affirmed.

Filed Nov. 1, 1892.

No. 15,966.

SAMPLE ET AL. v. CARROLL ET AL.

132	496
134	548
132	496
145	140
132	496
164	438

DRAINAGE.—Public Ditch.—Motion to Dismiss Petition.—How Made Part of Record.—Motions to dismiss the petition for the establishment and construction of a public ditch are collateral motions, and can only be made part of the record by a special order of court or by a bill of exceptions.

SAME.—Practicability of Route.—Matter of Discretion.—Appeal.—Selection of Line of Former Ditch.—The question of the practicability of a route to be selected for a ditch is one of discretion. The exercise of the discretion is vested in the inferior tribunal or its officers, and can not be reviewed on appeal, unless there is an abuse of discretion. The selection of the line of a former ditch is not such an abuse.

SAME.—Description of Lands.—Where the descriptions of the tracts involved in the proceedings to construct a ditch are copied as the statute requires, from the tax duplicate, the descriptions will, *prima facie*, at least, sustain an assessment for benefits accruing from the construction of the ditch.

SAME.—Imperfect Description of Lands.—Objection Must be Specific.—Signing Christian Names by Initials.—If land is described, although imperfectly, a remonstrator who seeks to defeat an assessment must make a timely and specific objection in the trial court. The fact that three of the twelve petitioners signed their Christian names by initials only will not defeat the assessments.

SAME.—Sufficiency of Bond.—Where there is a bond sufficient in form and substance, signed by solvent obligors, affording ample security, and taken and approved by the auditor, the proceedings will not be dismissed.

From the Boone Circuit Court.

H. J. Carson and J. W. Wiley, for appellants.

T. W. Lockhart and S. R. Artman, for appellees.

ELLIOTT, J.—The appellees petitioned the board of commissioners for the establishment and construction of a public ditch. The appellants filed what counsel denominate a remonstrance in the commissioners' court, but that court, holding their remonstrance or motion bad, decided against them, and they appealed to the circuit court. In the circuit court the appellants filed papers which their counsel designate as

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remonstrances, but which the appellees' counsel contend were collateral motions. The theory of the appellees is that as the papers were collateral motions they are not in the record because not embodied in a bill of exceptions. The first question, therefore, is whether the record is so made up as to present the questions argued by the counsel of the appellants.

It is established law that collateral motions are not part of the record unless made so by a special order of court or brought in by a bill of exceptions. *Ohio, etc., R. R. Co. v. McDaneld*, 5 Ind. App. 108. See, also, authorities cited in Elliott's Appellate Procedure, sections 190, 191 (814.) A special order is one made directly by the court, and is much more than a statement by the clerk or the mere transcription of an entry of the filing. As is *ex vi termini* implied in the language employed in the code, the order must be made by the court and must be specific. There is no special order in the record, so that there are no papers incorporated in it by that mode. The ruling on the papers was, of course, made during the formation of the issues, and such a ruling is not included in a general order allowing time for filing a bill of exceptions upon the ruling denying a motion for a new trial. See authorities cited in Elliott's Appellate Procedure, section 813. Neither the papers filed in making up the issues, nor the rulings thereon, are in the record by a bill of exceptions, inasmuch as time was taken in which to file the bill upon the ruling denying a new trial. The order granted leave beyond the term, and did not even assume to include rulings made in the formation of the issues.

If the papers and rulings, upon which the appellants' claim to a reversal is based, are in the record, it is because the papers are part of the pleadings and, as such, are parts of the intrinsic record. Whether they are direct motions or such pleadings as form part of the record proper must be determined from their general tenor and scope. We can not find

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in the parts of the record indicated by appellants' counsel any direct motion or pleading noted as filed in the circuit court which can be regarded as part of the record proper. The auditor certified to that court two motions to dismiss, but such motions are collateral ones, and we can not consider them as part of the record. See authorities cited in Elliott's Appellate Procedure, section 814, n. 2. What we have said certainly disposes of the specifications based upon the rulings on the motions to dismiss, and probably of all the specifications, inasmuch as they all refer to motions to dismiss. As there is, however, some confusion in the record, and some uncertainty as to the character of one of the papers, we shall not apply a strict rule, but will consider the principal questions arising upon what appellants denominate the "third remonstrance or motion to dismiss." Assuming, but by no means deciding, that the paper referred to is a remonstrance and part of the record proper, we dispose of the first point presented by saying: The question of the practicability of a route to be selected for a ditch is one of discretion; the exercise of the discretion vested in the inferior tribunal or its officers can not be reviewed on appeal, and the selection of the line of a former ditch is not an abuse of discretion. *Anderson v. Baker*, 98 Ind. 587; *Weaver v. Templin*, 113 Ind. 298; *Amoss v. Lassell*, 122 Ind. 36; *Zigler v. Menges*, 121 Ind. 99 (107), and cases cited. See, also, authorities cited in Elliott Roads and Streets, 276, 664.

In *Meranda v. Spurlin*, 100 Ind. 380, the question as to the right to construct a ditch along and upon an old ditch was directly presented and expressly decided adversely to the appellants in a very clear and strong opinion written by Zollars, C. J.

The second point presented we dispose of by adjudging that where the descriptions of the tracts of land involved in the proceedings are copied, as the statute requires, from the tax duplicate, the descriptions will, *prima facie*, at least, sustain an assessment for benefits accruing from the con-

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struction of the ditch. *Carr v. State, etc.*, 103 Ind. 548; *Zigler v. Menges, supra*. If land is described, although imperfectly, a remonstrator who seeks to defeat an assessment must make a timely and specific objection in the trial court. A vague, general objection is insufficient. *Meranda v. Spurlin, supra*; *Osborn v. Sutton*, 108 Ind. 443.

The fact that three of the twelve petitioners signed their Christian names by initials only does not entitle the appellants to defeat the assessments.

The appellants seek to profit by the fact (which, as they assert, the record shows) that the obligors in the bond filed with the auditor are all petitioners. We regard it as clear that the remonstrance can not be given such a protean form as to make it perform the dual functions of a remonstrance and a motion to dismiss. If it be granted that the failure to file a bond with sureties is sufficient cause for dismissal in a case where there is a bond signed by the petitioners and approved by the auditor, still, there is no adequate reason for a reversal in this instance, inasmuch as the question is not properly presented. But the authorities warrant the conclusion that where there is a bond sufficient in form and substance, signed by solvent obligors and affording ample security, and taken and approved by the auditor, the proceedings will not be dismissed. *Schneck v. Cobb*, 107 Ind. 439.

We have given the appellants the benefit of all inferences, and in so doing have, perhaps, departed from the general rule, but even thus liberally treating their appeal, we find no valid reason for sustaining it.

Judgment affirmed.

Filed Nov. 1, 1892.

ENGLISH, v. ALDRICH ET AL.

MORTGAGE.—*Action to Foreclose by Junior Mortgagee.*—*Senior Mortgagee Made Party.*—*When not Barred by Judgment.*—Where the holder of a senior mortgage was made a party defendant to an action brought by a junior mortgagee to foreclose his mortgage, and the complaint only called in question such liens as had accrued since the mortgage in suit was executed, the judgment therein that the mortgage sued on was the prior lien on the premises would not bar the right of the senior mortgagee, who simply filed a general denial and allowed judgment to be taken against him by default, to have his mortgage subsequently foreclosed.

SAME.—*When Senior Mortgagee Barred by Judgment.*—Where the holder of a junior mortgage instituted an action to foreclose the same and made a senior mortgagee a party defendant to the action, and the complaint alleged that the several defendants had or claimed to have some interest in or lien upon said mortgaged premises, "but if any such interest, lien or claim exists in behalf of them, or either or any of them, it is junior and subordinate to the lien of said mortgage," and the senior mortgagee failed to plead his prior mortgage, and the mortgage sued on was held to be senior to any lien held by any of the defendants, the judgment estopped the senior mortgagee from subsequently asserting his right under his mortgage.

SAME.—*When Equity Will not Relieve Against Judgment.*—Where in the latter case the counsel for the senior mortgagee were informed by a clerk in the office of plaintiff's attorney that he was made a party to the foreclosure suit in order to bar his equity of redemption under a judgment for costs he held, and for no other purpose, the appellant had no right to rely upon such statement as against the allegations in the complaint against him and the facts do not make a case calling for the exercise of the inherent power of a court of equity to set aside a judgment obtained by fraud or rendered through the mistake of the court. Such power will only be exercised when the party asking it is without fault, and where he proceeds without unreasonable delay after discovery of the fraud or mistake.

From the Marion Superior Court.

J. S. Duncan and C. W. Smith, for appellant.

J. Coburn, for appellees.

COFFEY, J.—This was an action by the appellant against the appellees to foreclose a mortgage upon certain described lots in Woodruff Place, in Marion county. It appears by

132	500
142	488
143	704
132	500
144	42
132	500
150	16
132	500
161	318
132	500
167	157

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the pleadings in the cause, as well as by the special findings of the court, that the mortgage which the appellant is seeking to foreclose was executed by James O. Woodruff to Daggy, Allen and McClain, on the 2d day of October, 1872, to secure certain promissory notes therein described, and that it covered lots 71 and 106, in Woodruff Place. The appellant became the owner of the notes by assignment. On the 4th day of August, 1873, Woodruff sold and conveyed lot 71 to Nicholas R. Ruckle, who assumed the payment of one of the notes held by the appellant, as part of the purchase-price of the lot, and executed to Woodruff a mortgage back on the lot to secure certain promissory notes of that date executed for the balance of the unpaid purchase-price. These last named notes were assigned by Woodruff to the appellees, John Beatty, John G. Mitchell and William Beatty. On the 24th day of August, 1876, Beatty, Mitchell and Beatty commenced their action in the Marion Superior Court against Ruckle, the appellant William H. English, and others, to foreclose the mortgage executed to secure the notes so assigned to them. The appellant was duly served with process. The allegations in the complaint so far as they related to the appellant were as follows: "The defendants, * * * William H. English (and others), have or claim to have some interest in or lien upon said mortgaged premises, accrued since the lien of said mortgage upon which this action is instituted." The prayer of the complaint was as follows: "Wherefore, the plaintiffs demand judgment as follows: First. That each and all of said defendants and all persons claiming under them, or through them, or either of them, may be foreclosed of all equity of redemption, or other interest in said mortgaged premises."

After the service of process, the appellant placed the case in the hands of his attorneys, who called upon the attorneys for the plaintiffs in the case to ascertain why the appellant was made a party, and in response to an inquiry upon that subject they were informed that the appellant had a mere

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nominal interest in the suit, consisting of a judgment for costs, which was a junior lien on the mortgaged premises, and that he was for that reason alone made a party. Relying on this statement and the allegations contained in the complaint, the appellant, by his attorneys, filed a general denial to the complaint. Subsequently the cause was called for trial in the absence of the appellant's counsel, and he was defaulted and the cause tried by the court. The court adjudged and decreed that the mortgage then sued on was the first and paramount lien on the mortgaged premises. The property was sold by the sheriff and bid in by the appellees in satisfaction of their mortgage. The court finds that the failure of the appellant to set up his prior mortgage was owing to the mutual mistake of the attorneys in the cause growing out of the belief that the judgment for costs above mentioned was the only lien against the property held by the appellant at that time.

The appellant remained in ignorance of the fact that the decree affected his prior lien until December, 1879, and upon the discovery of the facts he at once endeavored to adjust the matter with the appellees, but never succeeded, but before any positive refusal on their part to adjust the matter this suit was instituted.

On the 9th day of October, 1877, Tillman A. H. Johnson, having become the owner of lot 106 in Woodruff Place, executed a mortgage thereon to the Indianapolis Savings Bank to secure certain notes therein described, and, on the 19th day of December, 1878, said bank filed its complaint in the Marion Superior Court to foreclose said mortgage, making parties thereto the appellant and others.

In this complaint were the following allegations: "It is also alleged that the several defendants hereto have, or claim to have, some interest in or lien upon said mortgaged premises, but if any such interest, lien or claim exists in behalf of them, or either or any of them, it is junior and subordinate to the lien of said mortgage."

English v. Aldrich et al.

The appellant was duly served with process, and thereupon referred the case to his counsel to look after and make his defence. Such counsel called at the office of the attorney who brought the suit, and was shown an abstract of title, upon which appeared a small judgment for costs in favor of the appellant, which was a junior lien upon said lot, and was informed by the clerk in charge of the office, that the appellant was made a party to the foreclosure suit in order to bar his equity of redemption under said judgment for costs, and for no other purpose.

Relying on said statement, and being ignorant that appellant had any other interest therein his counsel, as a matter of form, filed an answer therein consisting of the general denial and a plea of payment.

Judgment was subsequently rendered in said cause, wherein it was decreed, as against the appellant, that the mortgage held by the bank was senior and paramount to any lien held by the appellant.

Within sixty days after the rendition of the decree the property was sold by the sheriff on a certified copy thereof. The court also found that the failure to set up the senior mortgage held by the appellant, in that suit, was the result of a mutual mistake between the attorneys of the appellant and the attorneys for the bank. The appellant remained ignorant of the terms of this decree, and of the facts in the case for several years after the decree was rendered, but when he did learn the same he at once endeavored to adjust the matter with the bank, failing in which he instituted this suit.

The court found as a conclusion of law upon the foregoing facts that the appellant was estopped and barred by the decrees above mentioned from foreclosing his mortgage lien on either lot seventy-one or lot one hundred and six.

The assignment of error calls in question the correctness of this conclusion.

It is contended by the appellant that inasmuch as a court of equity possesses the inherent power to set aside or relieve

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a party from a judgment taken against him by a fraud practiced upon the court, or by the mistake of the court without the fault of the party against whom the judgment is rendered, the court should exercise that power in this case, and relieve him from the injurious effects of the decrees here involved.

It is undoubtedly true that a court of equity does possess the inherent power, independent of any statutory provision, to annul and strike from its records a judgment procured and entered by the perpetration of a fraud upon the court; and it is also true that many cases are to be found where such power has been exercised as to judgments rendered by mistake. *Nealis v. Dicks*, 72 Ind. 374; *Freeman Judgments*, sections 484, 516; *Earl v. Earl*, 91 Ind. 27; *Cavanaugh v. Smith*, 84 Ind. 380; *Harman v. Moore*, 112 Ind. 221; *Nicholson v. Nicholson*, 113 Ind. 131; *Hogg v. Link*, 90 Ind. 346; *Weiss v. Guérineau*, 109 Ind. 438; *Millsbaugh v. McBride*, 7 Paige Ch. 509; *Johnson v. Coleman*, 23 Wis. 452; *Keith v. McCaffrey*, 145 Mass. 18; *Edson v. Edson*, 108 Mass. 590; *Patridge & Co. v. Harrow*, 27 Iowa, 96; *Wilson v. Boughton*, 50 Mo. 1; *Tucker v. Whittlesey*, 74 Wis. 74; *Beatty v. O'Connor*, 106 Ind. 81; *Hamlin v. McCahil*, Clark's Chancery, 249.

While the court possesses this power, it will not in all cases be exercised. It should be exercised only in clear cases, where the party asking it is himself without fault, and where he proceeds without unreasonable delay after the discovery of the fraud or mistake.

In this case the allegations in the complaints upon which the decrees in question were rendered are so different that they can not, with propriety, be considered together. In the suit instituted by the appellees Beatty and others, it was alleged, as to the appellant, that he had, or claimed to have, some interest in or lien upon said mortgaged premises accrued since the lien of said mortgage upon which this suit was instituted; while in the suit brought by the bank it was alleged that the several defendants thereto had, or claimed to

have, some interest in or lien upon said mortgaged premises; but if any such interest, claim or lien existed in behalf of them, or either or any of them, it was junior to and subordinate to the lien of said mortgage.

It will be observed that the allegations in these two complaints differ in this material respect, namely: the first called in question such liens only as had accrued since the mortgage in suit was executed, while the second called in question all the liens held by the defendants and alleged that they were junior and subordinate to the mortgage in suit.

No question is made as to the actual fact that the lien held by the appellant was senior to the liens which plaintiffs in those two suits foreclosed, and we are, therefore, met at this stage in the consideration of the case with the question as to whether these decrees, on their face, bar the right of the appellant to foreclose his senior lien. And first of the decree rendered in favor of Beatty and others.

Ordinarily, a party is bound by a judgment in the capacity in which he is sued, and in no other. *Davis v. Barton*, 130 Ind. 399.

The appellant was sued in the capacity of a junior lienholder, but we do not deem it necessary to inquire, in this case, whether a decree could have been rendered in the cause binding him as senior lienholder or not. He was not charged with holding a senior lien, but with holding a lien which had accrued since the execution of the mortgage in suit. When placed in possession of all the facts, so that we may construe the decree, we find this to be the fact. The complaint alleged the exact facts as they were known to the attorneys who drafted it, and they sought all the relief to which the plaintiffs in the case were entitled, for they were not entitled to foreclose their mortgage as against the appellant's senior lien.

In order to bar the appellant's right to redeem under his junior judgment for costs it was necessary to make him a party to the suit, and he was made a party for that purpose

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alone. The plaintiffs in that case had the right to foreclose their junior mortgage, buy in the property, and pay off the senior lien at their leisure, provided its holder or owner was willing to indulge them.

This decree must be construed with reference to those rights, the facts as they actually existed, and in connection with the allegations in the complaint.

The decree should not be construed in such a manner as to embrace matters upon which no issue could be made, unless such construction is absolutely necessary. No issue could have been made, or was in fact made, as to the senior lien held by the appellant.

We think the decree in this case should be construed as foreclosing all the liens held by the appellant junior to the mortgage therein foreclosed, and no other. To construe it as barring the senior lien held by the appellant would be to give it an effect never contemplated by the parties to the suit. The mortgage which the appellant now seeks to foreclose was in no way involved in that suit, and he was not called upon to set it up. For these reasons we are of the opinion that the facts found by the court do not bar his right to have the same foreclosed as against the appellees, Beatty, Mitchell and Beatty.

The case of the Savings Bank against the appellant stands upon entirely different ground. In that case the plaintiffs called in question all the liens held by the appellant, and alleged that they were subordinate to the lien of the mortgage then in suit. To protect his right to a senior lien, under these allegations, it was necessary to plead it. This he did not do, and having failed in this regard the decree rendered in the cause estops him from asserting that he held any such lien. *Masters v. Templeton*, 92 Ind. 447; *Aetna Life Ins. Co. v. Finch*, 84 Ind. 301; *Ulrich v. Drischell*, 88 Ind. 354; *Fitzpatrick v. Papa*, 89 Ind. 17; *Woodworth v. Zimmerman*, 92 Ind. 349.

Nor do we think the facts make a case calling for the ex-

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ercise of the inherent power of a court of equity to set aside a judgment obtained by fraud or rendered through the mistake of the court. It is not claimed that any fraud was perpetrated upon the court, and the court certainly made no mistake. The appellant had no right to rely upon a statement of the clerk in the attorney's office as against the allegations in the complaint against him. The case falls within that class where the mistake is to be accounted the misfortune of the party rather than the wrong of his adversary, and one in which a strong case, indeed, must be made to warrant the interference of a court of equity. *Ratliff v. Stretch*, 130 Ind. 282; *Davis v. Barton*, *supra*.

In our opinion the court did not err in its conclusions of law so far as they relate to lot numbered one hundred and six.

Judgment reversed as to the appellees Beatty, Mitchell and Beatty, with directions to restate the conclusions of law as to them in accordance with this opinion, and to render a decree foreclosing the mortgage of the appellant as to lot seventy-one in Woodruff Place, and as to the other appellees the judgment of the Marion Superior Court is affirmed.

Filed May 21, 1892; petition for a rehearing overruled Oct. 26, 1892.

 No. 14,960.

HECHT v. THE OHIO AND MISSISSIPPI RAILWAY COMPANY.

132	507
146	608
132	507
152	430

ACTION.—Survival of.—Personal Injuries.—Death of Party.—When Personal Representatives can not Maintain Action.—Sections 282 and 284, R. S. 1881 Construed.—Where an injured party brought suit and recovered damages in his lifetime, including damages for a disease superinduced by reason of his injuries, and the judgment was paid and received by him, and his death afterwards resulted from the injury, his personal representatives can not maintain an action. Under sections 282 and 284,

Hecht v. The Ohio and Mississippi Railway Company.

R. S. 1881, an action may only be maintained by the personal representatives of the deceased for the wrongful act or omission of another if the deceased might have maintained an action, had he lived, for such wrongful act or omission. An action for a cause of action liquidated and satisfied can not survive in favor of any person.

SAME.—In the action brought after the death of the injured party, the parties are the same as in the action instituted in his lifetime, except that the injured party is represented by his personal representatives. The cause of action is the same, and while in minor particulars the measure of damages differs, this does not cause the action to survive. Although some items of evidence may be competent or even necessary in one case that are not in the other, and the method of proof may differ, still the action in either case is based on the negligence of the defendant in causing the same and identical injury, and the damages sustained in either case grow out of the injury caused by such negligence.

From the Jefferson Circuit Court.

C. A. Korbly and W. O. Ford, for appellant.

W. M. Ramsey, L. Maxwell, R. Ramsey, J. McGregor and E. Barton, for appellee.

OLDS, J.—Abraham Hecht, in his lifetime, received an injury on account of the negligence of the appellee company, from which injury he afterwards died. The appellant was appointed administrator of his estate and brought this action. The complaint is in one paragraph, and alleges the necessary facts to make it a good complaint under section 284, R. S. 1881. Among other facts it alleges that the injury produced Bright's disease of the kidneys, from which disease he remained sick and lingered until the 27th day of November, 1887, at which time he died of said disease in consequence of the negligence of the appellee.

The appellee answered in four paragraphs, the first and fourth afterwards being withdrawn.

The second paragraph alleged that the intestate had recovered a judgment against the defendant for his injuries in his lifetime, and that an appeal was taken from the judgment to the Supreme Court and the judgment by that court affirmed and the same had been paid.

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The third set out a complete record of the proceedings and judgment in the cause prosecuted by the intestate, and in addition alleged that on the trial of said cause the intestate was permitted to show that he was suffering with Bright's disease of the kidneys, and that the same was the result of his injuries, and that said disease would probably prove fatal or at least shorten his life, and that he was suffering from other afflictions and diseases caused and superinduced by said injuries.

Separate demurrers were filed to the said second and third paragraphs of answer and overruled. Appellant refusing to plead further, judgment was rendered in favor of the appellee on demurrer. The rulings on the demurrer are assigned as error.

Section 284, *supra*, reads as follows: "Where the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages can not exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Section 282, R. S. 1881, provides that "A cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person." The clear intention of the Legislature, as expressed by these sections, is in effect that when the injury to the person causes the death of such person the action shall survive in favor of the person in whose favor an action is given for the injury causing the death. An action for a cause of action liquidated and satisfied can not survive in favor of any person. Section 284, *supra*, provides in terms that the action

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may be maintained by the personal representatives of the deceased for the wrongful act or omission of another if the deceased might have maintained an action, had he lived, for such wrongful act or omission. That is to say, if the deceased, at the time of his death, might have maintained such action, but the deceased having prosecuted to final judgment an action for such wrongful act or omission, and the judgment having been paid and received by him, he at the time of his death could not have maintained an action for such wrongful act or omission, as the right of action in his favor had merged into the judgment which was satisfied, hence no action exists in favor of the personal representatives of the deceased by virtue of the latter section. The position we have stated we think well supported by authority.

In an action by the deceased in his lifetime, he is entitled to recover full compensation for the injuries sustained, including injuries for disease superinduced by reason of the injuries.

In the case of *Ohio, etc., R. R. Co. v. Hecht*, 115 Ind. 443, this court says: "Where a disease caused by the injury supervenes, as well as where the disease exists at the time of the injury, and is aggravated by it, the plaintiff is entitled to full compensatory damages." See authorities cited in this decision. In such an action the injured party is entitled to recover full compensation for all the injuries which were the natural consequence of the wrongful act.

It was certainly not the intention of the Legislature that where the person guilty of the wrong has been once subjected to a suit by the injured party in his lifetime, and compelled to pay all the damages resulting from the injuries sustained by the wrongful act, he should again be liable to an action in favor of the personal representatives of the injured party after his death, and be again compelled to respond in damages for the same act.

It is suggested by counsel for the appellant that the answers are not good, for the reason that the parties are not the

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same; that the judgment was on a different cause of action, and that different facts will be presented in this action, and different evidence be required to sustain them. But we do not think these objections well taken. The parties are the same except that the injured party, who has died, is represented by his personal representative. It is true the statute provides that the proceeds shall go to his widow or children, or next of kin, but the administrator "stands in the shoes" of the deceased. The cause of action is the same. If the administrator recovers he must do so by reason of the same wrongful act on the part of the appellee company that enabled the intestate to recover.

It is suggested that the measure of damages is not the same, that the intestate might have recovered for suffering, loss of time, medical attendance, etc.; that the right to recover for these things died with him, and that by the statute a new cause of action is given for new injuries to other persons. By the survival of the action the right of recovery and measure of damages must necessarily be different, but the gist of the action, the principal and paramount right of recovery, is on account of the destruction of the capacity and power of the intestate to earn money and accumulate wealth for his own support and benefit, and the support and benefit of his family or next of kin.

The central and paramount thing or item for which damages may be recovered is the same whether the recovery be by the intestate in his lifetime or by his personal representative after his death. In minor particulars the measure of damages differs, but this does not warrant such a construction of the statute as contended for by counsel for appellant.

It is further urged that the former judgment is not a bar for the reason that different facts are here presented and different evidence is required to sustain the suit. While it may be true that some items of evidence may be competent or even necessary in one case that are not in the other, and the method of proof may differ, yet it remains a fact that the

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action in either case is based on the negligence of the appellee causing the same and identical injury to the appellant's intestate, and the damages sustained in either case grow out of the injury to the intestate caused by the negligence of the appellee. It is contended that the section of the statute, section 284, *supra*, gives a new right of action in favor of the administrator for the benefit of the widow and children, if any, or the next of kin. This is true in a certain sense. Without the statute the action could not be maintained, but in order that it may be maintained the intestate must have had a right of action against the person whose wrongful act or omission caused the injury which he could have maintained had he lived, and when, as in this case, the injured party has prosecuted an action for damages on account of the injury to final judgment, and the judgment has been satisfied prior to his death, he, if he had lived, could not have prosecuted an action against the person causing the injury for the same act or omission.

The construction we have given to this section of the statute is well supported. In the case of *Burns v. Grand Rapids, etc., R. R. Co.*, 113 Ind. 169, in speaking of the right of action under this statute, the court says: "Although the right thus created is purely of statutory origin, its nature and incidents, and the conditions upon which a recovery may be had, are in no essential respect different from those which relate to an ordinary civil action to recover damages for a civil injury. * * * The recovery is not a penalty inflicted by way of punishment for the wrong, but is merely compensatory of the damages sustained by the heirs or next of kin, who had, or are supposed to have had, a pecuniary interest in the life of the intestate." *Evansville, etc., R. R. Co. v. Lowdermilk*, 15 Ind. 120. In *Stewart v. Terre Haute, etc., R. R. Co.*, 103 Ind. 44, it is held that as the right to sue is purely statutory, and in derogation of the common law, the statute must be strictly construed and a case brought clearly within its provisions to enable a plaintiff to recover.

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The statutes of this State, and of some of the other States, are moulded in a measure after Lord Campbell's Act, 86 Statutes at Large, 531, 9 and 10 Viet., chapter 93, which is as follows:

“VI. (ENGLISH AUTHORITIES.).

“Section 1. Whosoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

“Sec. 2. Every action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased. And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought. And the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties, in such shares as the jury by their verdict shall find and direct.

“Sec. 3. *Provided*, always, that not more than one action shall lie for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within twelve calendar months after the death of such deceased person.”

Under this act it was held in an action against a railway company that the cause of action was the defendant's negligence, which had been satisfied in the deceased's lifetime,

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and that the death of the injured party did not create a fresh cause of action. *Reed v. Great Eastern R. W. Co.*, L. R. 3 Q. B. 555; *Griffiths v. Earl of Dudley*, L. R. 9 Q. B. D. 357; *Haigh v. Royal Mail Steam Packet Co.*, Law Jour. (new series), Q. B. D. Vol. 52, p. 640. In the latter case it was held that the personal representatives can not maintain an action under Lord Campbell's act when the deceased, if he had survived, would not have been entitled to recover. In that case by a stipulation in the ticket, by virtue of which the deceased was being carried, the company was exempt from liability for injury resulting to the passenger.

The wording of Lord Campbell's act and the statute of this State differ somewhat, but are in effect the same. The purpose of each was to give to the personal representative of the deceased a right of action if the deceased at the instant of his death would have had a right of action for the same act or omission had he survived.

In the former it is provided in effect that if the wrongful act, neglect or default causing death is such as would, if death had not ensued, entitle the party injured to maintain an action, then the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person; and the second section provides that the action shall be for the benefit of the wife, husband, parent and child of the person injured, and be brought in the name of his executor or administrator; and the third section provides that but one action shall lie for the same subject-matter of complaint, while the statute of this State provides that the action may be prosecuted in the name of the personal representative if the injured party might, if he had lived, have maintained an action for the injury caused by the wrongful act or omission of the other party, and that the damages recovered shall enure to the benefit of the widow and children, if any, or next of kin. Each act gives a right of action to the personal representative of the deceased for the wrongful

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act only in cases where the injured party had a right of action at the instant of his death, which he might have maintained if he had survived.

The Court of Appeals of New York, in construing a like statute, held that when the injured party brought suit and recovered damages in his lifetime, and his death afterwards resulted from the injury, his personal representatives could not maintain an action. *Littlewood v. Mayor, etc.*, 89 N. Y. 24. See, also, *Hegerich v. Keddie*, 99 N. Y. 258. ,

Under a like statute in Illinois, the Supreme Court of that State held that the cause of action is the wrongful act causing the death, and not the death itself. *Holton v. Daily*, 106 Ill. 131.

The statute of Tennessee, section 2291 of the code, provides that "The right of action which a person, who dies from injuries, received from another, or whose death is caused by the wrongful act or omission of another, would have had against the wrong-doer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his personal representatives for the benefit of his widow and next of kin, free from the claims of creditors." The Supreme Court of that State held that the cause of action accrued at the date of the injury, and is the same whether brought by him during life or by his personal representatives after death. *Fowler v. Nashville, etc., R. R. Co.*, 9 Heiskell, 829.

While the language of the statutes differs slightly, the purpose of each is to give to the personal representatives of the injured party the right to maintain an action for the wrongful act or omission causing the injury, against the party guilty of the wrong, and is, in effect, but declaring that the cause of action shall survive and be maintained by the personal representatives for the benefit of the parties named in the act. The action is bottomed on the same wrongful act of the wrong-doer, whether it be prosecuted by the injured party

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in his lifetime or by his personal representatives after his death.

The Supreme Court of Vermont, in *Legg v. Britton*, 24 At. Rep. 1016, held that where the injured party had commenced suit in his lifetime, and then died, and by virtue of a statute of that State, his administrator prosecuted the cause to final judgment, it was a bar to another action under a statute practically the same as Lord Campbell's Act and the statute of this State.

As we have heretofore said, it was certainly not the intention of the Legislature to subject the party guilty of the wrongful act or omission resulting in an injury to another to a second action for such act after the injured party had prosecuted to judgment one action in his lifetime, and recovered full compensation for the injuries inflicted, and which would bar him personally from maintaining any further action on account of the same injury, for the act, as we construe it, clearly declares that the personal representatives of the injured party, where death ensues, may maintain the action only in case the injured party might, at the instant of his death; have maintained the action if he had lived.

In this case the injured party at the time of his death could not have maintained an action for the same act or omission had he lived, hence there is no right of action given to his personal representatives by the statute.

The conclusion we have reached leads to an affirmance of the judgment.

Judgment affirmed, with costs.

Filed Oct. 27, 1892.

The Louisville, Evansville and St. Louis, etc., Railroad Co. v. Wilson et al.

No. 15,887.

THE LOUISVILLE, EVANSVILLE AND ST. LOUIS CONSOLIDATED RAILROAD COMPANY v. WILSON ET AL.

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COMMON CARRIER.—*Overcharge of Freight.*—*Voluntary Payment.*—The payment of an overcharge of freight to a railroad company engaged as a common carrier of goods is not a voluntary payment within the ordinary meaning of that term, and a shipper has the right to sue upon his contract and recover back the excess of freight paid over the contract rate.

SAME.—*Complaint.*—*Averment as to Payment of Excess.*—Where in an action to recover excess of freight the complaint charged that the excess so charged and received by the defendant was \$2,800, but it did not appear by affirmative allegation that it was paid by the plaintiffs, the inference will be indulged that it was, as they were the shippers, and the complaint will be good as against a demurrer.

SAME.—*Unjust Discrimination Against Shipper.*—*Instruction to Jury.*—In such an action, where the evidence showed that for some years prior to the 1st of January, 1887, the plaintiffs and several other parties had been engaged in the business of purchasing and shipping railroad ties over the defendant's road from the stations named in the complaint to the city of Evansville, and that prior to that date a uniform rate of freight per car load of two hundred ties was charged, and that after that date the defendant raised the freight rate ten dollars per car on all shippers except one D., an instruction was proper which informed the jury that if during several months of the year 1887 the plaintiffs shipped a large number of cross-ties in the usual manner over the defendant's road, and during the same time D. shipped a greater number of car-loads under special contract, which, in addition to the contract of assignment contained other stipulations of advantage to the defendant, the natural and necessary effect of the transaction, considered in detail and altogether, was a substantial discrimination in favor of D., against the plaintiffs, whereby the plaintiffs were made to pay the defendant many hundred dollars in excess of that paid by D. for similar services, and in excess of the value of all that was done or furnished or to be done or furnished by him under the special contract, and the plaintiffs, upon making a demand would be entitled to recover for the excess of freight so paid by them.

SAME.—*When Right to Discriminate Inapplicable.*—Where the commodity shipped for D. and the commodity shipped for the plaintiffs was the same, and all was shipped in full car-loads and from the same stations, the rule does not apply which permits a carrier to discriminate in favor of a shipper who transports large quantities of a given commodity in one parcel at a time as against a shipper who transports the same com-

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in his lifetime or by his personal representatives after his death.

The Supreme Court of Vermont, in *Legg v. Britton*, 24 At. Rep. 1016, held that where the injured party had commenced suit in his lifetime, and then died, and by virtue of a statute of that State, his administrator prosecuted the cause to final judgment, it was a bar to another action under a statute practically the same as Lord Campbell's Act and the statute of this State.

As we have heretofore said, it was certainly not the intention of the Legislature to subject the party guilty of the wrongful act or omission resulting in an injury to another to a second action for such act after the injured party had prosecuted to judgment one action in his lifetime, and recovered full compensation for the injuries inflicted, and which would bar him personally from maintaining any further action on account of the same injury, for the act, as we construe it, clearly declares that the personal representatives of the injured party, where death ensues, may maintain the action only in case the injured party might, at the instant of his death, have maintained the action if he had lived.

In this case the injured party at the time of his death could not have maintained an action for the same act or omission had he lived, hence there is no right of action given to his personal representatives by the statute.

The conclusion we have reached leads to an affirmance of the judgment.

Judgment affirmed, with costs.

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132	517
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COMMON CARRIER.—Overcharge of Freight.—Voluntary Payment.—The payment of an overcharge of freight to a railroad company engaged as a common carrier of goods is not a voluntary payment within the ordinary meaning of that term, and a shipper has the right to sue upon his contract and recover back the excess of freight paid over the contract rate.

SAME.—Complaint.—Averment as to Payment of Excess.—Where in an action to recover excess of freight the complaint charged that the excess so charged and received by the defendant was \$2,800, but it did not appear by affirmative allegation that it was paid by the plaintiffs, the inference will be indulged that it was, as they were the shippers, and the complaint will be good as against a demurrer.

SAME.—Unjust Discrimination Against Shipper.—Instruction to Jury.—In such an action, where the evidence showed that for some years prior to the 1st of January, 1887, the plaintiffs and several other parties had been engaged in the business of purchasing and shipping railroad ties over the defendant's road from the stations named in the complaint to the city of Evansville, and that prior to that date a uniform rate of freight per car load of two hundred ties was charged, and that after that date the defendant raised the freight rate ten dollars per car on all shippers except one D., an instruction was proper which informed the jury that if during several months of the year 1887 the plaintiffs shipped a large number of cross-ties in the usual manner over the defendant's road, and during the same time D. shipped a greater number of car-loads under special contract, which, in addition to the contract of assignment contained other stipulations of advantage to the defendant, the natural and necessary effect of the transaction, considered in detail and altogether, was a substantial discrimination in favor of D., against the plaintiffs, whereby the plaintiffs were made to pay the defendant many hundred dollars in excess of that paid by D. for similar services, and in excess of the value of all that was done or furnished or to be done or furnished by him under the special contract, and the plaintiffs, upon making a demand would be entitled to recover for the excess of freight so paid by them.

SAME.—When Right to Discriminate Inapplicable.—Where the commodity shipped for D. and the commodity shipped for the plaintiffs was the same, and all was shipped in full car-loads and from the same stations, the rule does not apply which permits a carrier to discriminate in favor of a shipper who transports large quantities of a given commodity in one parcel at a time as against a shipper who transports the same com-

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modity in small quantities in broken packages. Neither does the rule apply which permits the common carrier to discriminate in favor of one class of goods over others of a different class.

SAME.—*Shipment of Larger Number of Car-Loads.*—*No Basis for Discrimination.*—The fact that D. was able to furnish a larger number of car-loads of ties than the plaintiffs would not justify a discrimination in his favor over the rates charged to the plaintiff. As to whether the fact that D. agreed to furnish the defendant such ties as it desired for its own use at a given price relieved the discrimination of its objectionable feature, by which it became a reasonable discrimination, was a question of fact which was properly submitted to the jury for its determination.

SAME.—*Establishment of Discriminating Rates for Railroad's Advantage.*—A carrier can not rightfully establish rates in order to keep on the line material for which it has use, or to keep the price low for its own advantage, producers being entitled to sell where they wish and in the most available market.

SAME.—*When Discrimination Unjust.—Consideration.*—If the contract was of such a character as to destroy the business of the plaintiffs by reason of the discrimination in favor of D., and thus enable D. to acquire a monopoly of the business of purchasing and shipping cross-ties over defendant's road, the discrimination was unjust without regard to the consideration upon which it was based.

SAME.—*Instruction to Jury.*—An instruction was properly refused which excluded from the consideration of the jury the question as to whether there had been an unjust discrimination made by the defendant in favor of D., whereby the plaintiff had been damaged.

From the Vanderburgh Superior Court.

A. P. Humphrey, A. Gilchrist and C. A. De Bruler, for appellant.

W. Hamill, J. S. Buchanan and C. Buchanan, for appellees.

COFFEY, J.—This case is here for the second time. See *Louisville, etc., R. R. Co. v. Wilson*, 119 Ind. 352.

Upon a return of the case to the court below, the appellees filed an amended complaint consisting of seven paragraphs. There was a verdict against the appellees on the first, second and third paragraphs of the complaint, so they need no further notice. The appellant contends that the superior court erred—

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First. In overruling its demurrer to the fifth, sixth and seventh paragraphs of the complaint.

Second. In overruling its motion for a new trial.

The fifth paragraph of the complaint alleges, substantially, that the appellees, as partners, were engaged in the business of purchasing and shipping railroad ties; that the appellant owned and operated a railroad running by and through the stations and towns of Tennyson, Chandler, Gentryville and Ferdinand, in Indiana; that there was no other railroad through or near these places for the transportation of freight; that after the construction of the appellant's road the appellees engaged in the business of purchasing railroad cross-ties and shipping the same from the above-named stations to the city of Evansville; that the regular and reasonable charge and tariff rate of freight for cross-ties from those stations to the city of Evansville was fourteen dollars per car, and that such price had been charged from the date of the construction of the road until the 1st day of January, 1887, and that such price and rate of freight is still the amount charged for the shipment of cross-ties from these stations to Evansville; that such sum was the full and reasonable charge for such freights, and was and has been so recognized by the appellant; that prior to the 1st day of January, 1887, there were several parties engaged in the purchase and shipment of cross-ties from said stations; that after the 1st day of January, 1887, the appellant wrongfully and unjustly charged as freight for cars loaded with cross-ties the sum of twenty-four dollars for each car from said stations to the city of Evansville; that such charge was unreasonable and excessive, and destructive of the business of the appellees; that at the time such increased rate of freight was charged by the appellant, appellees had at said stations and along the line of said road 100,000 cross-ties which had cost them twenty-five thousand dollars; that said ties could not be shipped by any other railroad, as appellant knew; that the appellees had contracted for the sale of the ties and were compelled to fill and

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complete such contract; that they were unable to purchase ties at any other place to fill the same, and were compelled to ship the same over the appellant's road; that the appellant collected from the consignees of said ties the sum of twenty-four dollars freight on each car so shipped by the appellees from said stations to the city of Evansville; that they shipped three hundred and fifty-four cars of said ties between the 1st day of January, 1887, and the 1st day of August of that year from the above named stations to the city of Evansville to fill their contract and dispose of such cross-ties; that the excess of freight so charged and received by the appellant was twenty-eight hundred dollars; that at the same time the appellant was so charging the appellees the sum of twenty-four dollars per car it was charging other parties for similar shipments the sum of fourteen dollars only; that before the commencement of this suit the appellees demanded of the appellant said sum of twenty-eight hundred dollars, which it refused to pay, and thereupon they demanded of the appellant twenty-eight hundred dollars damages, which it refused to pay.

The sixth paragraph of the complaint is similar to the fifth, except that it contains the further allegations that the appellant entered into a contract with one Dickason, whereby Dickason was permitted to ship cross-ties over the appellant's road at fourteen dollars per car-load, each load containing two hundred ties, while it charged the appellees and all others the sum of twenty-four dollars per car for like shipments; that the contract with Dickason was made for the purpose of giving him a monopoly of the business of purchasing and shipping cross-ties on the line of the appellant's road; that by reason of such unjust discrimination the business of the appellees was destroyed, to their damage in the sum of twenty-eight hundred dollars.

The seventh paragraph is substantially the same as the fifth, except that it contains the further allegation that it received receipts from the appellants for the cross-ties ship-

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ped, which the appellants called bills of lading, but which the appellees refused to accept as such, but did receive them as receipts for ties shipped.

It is claimed by the appellant that the court erred in overruling the demurrer to the fifth and seventh paragraphs of the complaint because it appears from each of these paragraphs that the payments therein set forth were voluntary payments. It is said by counsel, in their brief, that no kind of extortion is shown, no pretence that the appellant refused to carry the cross-ties or refused to deliver them unless the rates charged were paid; nor is there any claim that the appellees were ignorant of the facts stated in these paragraphs at the time the freight was paid.

On the other hand, it is contended by the appellees that payments made to a railroad company, or other common carrier, for overcharges for carrying freight are not voluntary payments, for the reason that the shipper and carrier do not stand upon an equality.

The only authorities cited by the appellant holding that payment without protest to a common carrier for an overcharge is a voluntary payment are the cases of *Evershed v. London, etc., R. W. Co.*, L. R. 3 Q. B. 134, and *DuBose v. Georgia, etc., R. R. Co.*, 50 Ga. 304.

We are of the opinion, however, that the decided weight of authority is that the payment of an overcharge of freight to a railroad company engaged as the common carrier of goods is not a voluntary payment within the ordinary meaning of that term.

In the case of *Heiserman v. Burlington, etc., R. W. Co.*, 16 American and English Railroad Cases, 46, which was an action to recover for overpayment of freights, the court said: "Nor need the plaintiff, in a case brought to enforce such obligation, show objection or protest prior to the payment made in excess of reasonable compensation. These rules are founded upon the consideration that railroad companies are public carriers, and those who employ them are in their

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to make it more specific, but such a defect is not reached by demurrer.

In our opinion the court did not err in overruling the demurrer of the appellant to either the fifth, sixth or seventh paragraphs of the complaint.

Under the second assignment of error it is contended by the appellant that the court erred in giving to the jury certain instructions asked by the appellees, in giving a certain instruction to the jury on its own motion, and in refusing to give certain instructions which, at the proper time, it asked the court to give to the jury.

As instructions must be pertinent to the case made by the evidence in the cause, it is proper to state the case now before us as it is made by the evidence introduced by the parties on the trial of the cause, before we examine the instructions given and refused.

It appears from the proofs in the case that the appellant's road runs for some considerable distance through a heavily timbered country. For some years prior to the 1st day of January, 1887, the appellees and several other parties had been engaged in the business of purchasing and shipping railroad ties over the appellant's road from the stations named in the complaint to the city of Evansville. Prior to that date the uniform rate of freight from these stations to the city of Evansville was fourteen dollars per car load of two hundred ties. In the fall and early winter of 1886 the appellees had purchased and had piled up on the appellant's road, at the stations named, a large number of railroad ties which they could ship in no way except over the road operated by the appellant. On the 1st day of January, 1887, the appellant raised the price of freight on railroad ties from said stations to the city of Evansville from fourteen to twenty-four dollars per car on all shippers except one Dickason. The appellant entered into a contract with Dickason, by the terms of which he was permitted to ship ties from these stations at the price of fourteen dollars per car in consideration that he

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would ship over the road five hundred cars per month, and would sell it such ties as it needed at twenty-five cents each. The evidence tends to prove that the price of ties on this road was twenty-six cents at the time the contract was made. After the freight was so raised the appellees shipped the ties they then had on hand over the appellant's road, amounting to about three hundred and fifty-three cars, upon which the appellant collected from the consignees twenty-four dollars per car, which was deducted by the consignees from the agreed price to be paid for the ties, on settlement with the appellees. The result of the discrimination in favor of Dickason was to drive the appellees and other dealers in ties off the appellant's road, and thus give Dickason a monopoly of the business of purchasing and shipping ties.

Upon these facts the court of its own motion, as well as at the request of the appellees, instructed the jury, substantially, that if during seven months of the year 1887 the appellees shipped three hundred and fifty-three car-loads of cross-ties, in the usual manner, over the appellant's railroad, and during the same time Dickason shipped a greater number of car-loads under a special contract, which, in addition to the contract of assignment, contained other stipulations of advantage to the appellant; that the natural and necessary effect of these transactions, considered in detail and altogether, was a substantial discrimination in favor of Dickason and against the appellees, whereby the appellees were made to pay to the appellant many hundred dollars in excess of that paid by Dickason for similar services, and in excess of the value of all that was done or furnished or to be done or furnished by him under the special contract, then the appellees, upon making a demand, would be entitled to recover for the excess of freight so paid by them.

If any objection at all can be urged against these instructions it is, we think, that they are, under the facts in this case, too favorable to the appellant.

It is not true that a railroad company, engaged in the

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business of a common carrier, possesses the same liberty to make contracts for its profit in carrying freight or passengers that a private person engaged in a private business possesses in making contracts in relation to private affairs.

Railroad companies are granted charters and are given the right of eminent domain because when the roads are constructed, though owned by the corporation, they are nevertheless for public use, and are, in a qualified sense, public highways. Every one constituting a part of the public, for whose use they are constructed, is entitled to an equal and impartial participation in the use of the facilities for transportation which they afford. While power to fix rates is conferred upon them by law, such rates are always open to investigation by the courts, for it is an elementary rule that common carriers can charge no more than a reasonable compensation for the services performed.

While it is true that there is apparently some conflict in the authorities, the principles here announced, we think, are supported by the weight of authority. *Root v. Long Island R. R. Co.*, 114 N. Y. 300; *Express Co. v. Main Central R. W. Co.*, 57 Me. 188; *Scofield v. Lake Shore, etc., R. W. Co.*, 43 Ohio St. 617; *Sandford v. Railroad Co.*, 24 Pa. St. 378; *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309; *Attorney General v. Railway Co.*, 35 Wis. 425; *Samuels v. Louisville, etc., R. R. Co.*, 31 Fed. Rep. 57; *Providence Coal Co. v. Providence, etc., R. R. Co.*, 1 Inter-State Commerce Rep. 107.

A writer on railway law thus expresses the general rule: "Railways are held to the strictest impartiality in the conduct of their business in withholding all privileges or preferences from one customer which are not extended to all others." 1 Woods Railway Law, 565.

Of course there are some exceptions to the general rule, and we are not unmindful of the rule which permits a common carrier to discriminate in favor of a shipper who transports large quantities of a given commodity in one parcel at

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a time as against a shipper who transports the same commodity in small quantities in broken packages. Such discrimination is rendered necessary by the increased expense of handling, storing and caring for the smaller quantities, and is not unreasonable. Nor have we overlooked the rule which permits the common carrier to discriminate in favor of one class of goods over others of a different class. These rules constitute an exception to the general rule, but in our opinion they have no application here. In this case the commodity shipped for Dickason and the commodity shipped for the appellees was the same. All was shipped in full car loads and from the same stations. It is difficult to perceive how it is possible that it should cost more to ship a car load of cross-ties for the appellees than to ship a car load for Dickason. It is plain, therefore, we think, that discrimination of ten dollars on the car was unreasonable unless there was something in the special contract between the appellant and Dickason which rendered such discrimination reasonable.

It is contended by appellant that in view of the fact it secured by its contract with Dickason a certain income of \$7,000 per month that it could as well afford to carry ties for him at \$14 per car as to carry them for the appellees at \$24 per car.

We find it unnecessary to enquire whether the appellant is correct or otherwise in this contention, for as we understand the law a railroad company, engaged in the business of a common carrier, is not permitted by the law to discriminate in favor of a shipper who is able to furnish a large amount of freight over one engaged in the same business who is unable to furnish the same quantity as that shipped by his more opulent rival. The reasons for prohibiting such discrimination are well stated in the case of *Hays v. Pennsylvania Co.*, *supra*. In that case it was said: "The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during

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the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is, in some degree, subject to the will of railroad officials; for if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from twenty-five to fifty cents per ton less than another competing with him in business, solely on the ground that he is able to furnish, and does furnish, the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers and millers, dealers in lumber and grain and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of the railroad officials as upon the energies and capacities of the parties prosecuting the same. * * * The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents; or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to the consumers."

In our opinion the fact that Dickason was able to furnish a larger number of car loads of ties for shipment than the appellees could constitute no sufficient reason for a discrimination in his favor over the rates charged to the appellees.

As to whether the fact that Dickason agreed to furnish the

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appellant such ties as it desired for its own use at a given price, relieved the discrimination of its objectionable features by which it became a reasonable discrimination, was a question of fact, which was properly submitted to the jury for its determination.

The court, at the request of the appellees, instructed the jury, in substance, that a carrier can not rightfully establish rates in order to keep on its line material for which it has use, or to keep the price low for its own advantage; that the producers are entitled to sell it when they wish and in the most available market. Common carriers are forbidden to attempt this by applying disproportionate or unreasonable rates.

It is contended by the appellant that there was no evidence in the cause to which this instruction could apply, but we think otherwise. The fact that the appellant made a contract with Dickason for cross-ties, to be used by it, at less than the selling price, and then discriminated against all other dealers in such a manner as to drive them from its road authorized the inference that one object in view was to keep the ties it desired to use upon its line and to keep down the price.

We think the instruction stated the law correctly, and that it was applicable to the evidence in the cause. *Reynolds v. Western, etc., R. W. Co.*, 1 Interstate Com. Rep. 347.

We are of the opinion that there is no error in the instructions given by the court of which the appellant has the right to complain.

Instruction number three, asked by the appellant and refused by the court, was vicious, in that it was calculated to create the impression upon the minds of the jury that the contract between the appellant and Dickason did not amount to an unjust discrimination if it was based upon an adequate consideration.

If the contract was of such a character as to destroy the business of the appellees by reason of the discrimination in

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favor of Dickason, and thus enable Dickason to acquire a monopoly of the business of purchasing and shipping cross-ties on appellant's road, the discrimination was unjust, without regard to the consideration upon which it was based. *Chicago, etc., R. R. Co. v. People, ex rel.*, 67 Ill. 11; *People, ex rel., v. Chicago, etc., R. R. Co.*, 55 Ill. 111; *Chicago, etc., R. W. Co. v. People, ex rel.*, 56 Ill. 365; *Garton v. Bristol, etc., R. W.* 95 Eng. Com. Law, 641; *Crouch v. London, etc., R. W. Co.*, 78 Eng. Com. Law, 254; *Sandford v. Railroad Co.*, 24 Pa. St. 382; *Chicago, etc., R. R. Co. v. Thompson*, 19 Ill. 577; *Western Transportation Co. v. Newhall*, 24 Ill. 466.

There was no evidence in the record to which the fourth instruction asked by the appellant was applicable, and for that reason it was properly excluded.

The sixth instruction asked by the appellant and refused by the court was defective, in that it excluded from the consideration of the jury the question as to whether there had been an unjust discrimination made by the appellant in favor of Dickason, whereby the appellees had been damaged.

In our opinion there is no error in the record for which the judgment in this case should be reversed.

Judgment affirmed.

Filed Oct. 27, 1892.

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 No. 15,850.

YOUNG ET AL. v. BERGER.

MECHANIC'S LIEN.—*Failure to Give Notice to Owner.*—*Special Finding of Facts.*—In an action by a material man to foreclose a mechanic's lien, the materials having been furnished at a time when it was necessary to give notice to the owner in order to acquire a lien, the burden was on the plaintiff to establish the fact of notice, and the failure of the court in its special finding of facts to find upon that point was equivalent to a finding against the plaintiff.

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SAME.—When the court, instead of finding that either notice was or was not given, made a finding containing recitals of a portion of the evidence, with certain evidentiary facts, all bearing upon the question of notice, but made no finding whatever as to the fact itself, the finding must be regarded as against the plaintiff upon that subject.

SAME.—*Practice.—Special Finding not Sustained by Sufficient Evidence.*—In order to present the question raised by the failure of the court to find on the fact of the notice, it was proper for the appellant to move for a new trial on the ground that the special finding was not sustained by sufficient evidence and was contrary to the evidence.

From the Delaware Circuit Court.

J. F. Sanders and J. M. Templer, for appellants.

J. W. Ryan and W. A. Thompson, for appellee.

McBRIDE, C. J.—The appellee contracted with one Searles to make some repairs to certain buildings belonging to him. The repairs included the placing of some mantels and grates.

Searles purchased the mantels and grates of the appellant, who by this suit sought to foreclose a material man's lien for their value.

The court, by request of parties, made a special finding of the facts and stated his conclusions of law thereon. The facts as found by the court were favorable to the appellant, and were full and explicit, except as to the giving of the notice required by section 5 of the act of March 6, 1883. Elliott's Supplement, section 1692. At the time the materials in question were furnished that section was in force, and the giving of the notice was necessary to the acquisition of the lien.

In his suit to foreclose the lien the burthen was on the appellant to establish the fact of the giving of the notice.

If the court had found affirmatively that no notice was given, it is manifest that there could have been no foreclosure of the lien.

The court, instead of finding either that notice was or was not given, made a finding containing recitals of a portion of the evidence, with certain evidentiary facts, all

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bearing upon the question of notice, but made no finding whatever as to the fact itself.

The burthen being on the appellant to establish the fact of notice, the failure of the court to find upon that fact is equivalent to a finding against him. Elliott's Appellate Proc., section 757, and cases collected in note 3.

None of the evidentiary facts found are sufficient to supply the place of the essential, omitted finding.

When the finding of an evidentiary fact is such as to necessarily involve the existence of the essential, or ultimate fact, the failure to make the ultimate finding may be immaterial. But, when the existence of the evidentiary fact is not inconsistent with the non-existence of the ultimate fact, or is equivocal, or doubtful, the trial court must resolve the doubt by a direct finding as to the ultimate and decisive fact.

In the case before us we might, if at liberty to weigh the evidence, and evidentiary facts embodied in the fourth finding, conclude that they were sufficient to show notice. In doing so, however, we would be discharging the functions of the trial court, and not of an appellate tribunal. We must, therefore, treat the finding as against the appellant on that point. It follows, that the court did not err in its conclusion that the law would not justify a judgment in favor of the appellant upon the facts as found.

The appellant moved for a new trial on the ground that the special finding was not sustained by sufficient evidence, and was contrary to the evidence. This was a proper method of presenting the question raised by the failure of the court to find on the fact of notice. Elliott's Appellate Proc., section 757, and cases cited in note 4.

It is, however, ineffectual in this case to afford any relief to the appellant. The absence of any finding upon that question being treated as a finding against him, and the evidence relating to notice being conflicting, this court

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will not weigh it to determine whether or not the finding is wrong.

Judgment affirmed.

Filed Nov. 3, 1892.

No. 15,674.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY v. STANSBERRY.

132	533
142	482
143	131
143	607
132	533
152	670

INTERROGATORIES TO JURY.—*Must not Involve a Question of Law.*—In connection with other interrogatories which were submitted to the jury, the court refused to submit the following: "11. Q. If plaintiff did not look to see where she was stepping when she alighted, what reason or excuse was there for her not doing so? 12. Q. If you answer question eleven affirmatively, if there was any other reason or excuse, state fully what it was."

Held, that an answer to these interrogatories would necessarily have involved a question of law, which can not be submitted to a jury by interrogatories.

RAILROAD.—*Defective Platform.*—*Use of by Passenger.*—*Degree of Care Necessary.*—In order to make a passenger using a platform guilty of contributory negligence, the defect must be such as would naturally suggest to one of common understanding that it was dangerous, and such as to place one in peril to pass over it. A passenger is not bound to that degree of inspection and care as a servant in the master's service.

INSTRUCTION TO JURY.—*When not Error to Refuse to Give.*—It is not error to refuse to give an instruction when there are other instructions given quite as favorable as the one refused.

SAME.—*Comment on While Reading.*—*When Error.*—When a judge in reading instructions to a jury stopped and said: "That's not correct; I'll read that again," and thereupon re-read the instruction, the statement of the judge, not bearing upon a question of law or fact involved in the case, is not to be taken as a part of the instruction, and was not erroneous.

From the Lawrence Circuit Court.

M. F. Dunn, G. G. Dunn, W. M. Ramsey, L. Maxwell, R. Ramsey, and E. Barton, for appellant.

R. N. Palmer and J. Giles, for appellee.

MILLER, J.—This action was brought to recover damages for a personal injury.

The complaint is in two paragraphs. The first charges that the appellee, who was the plaintiff in the action, was a passenger upon the appellant's road from Huron to Mitchell, and that in alighting at that point from the train she stepped into a hole in defendant's platform, which was out of repair and unsafe, and injured her foot.

The second paragraph alleges that in consequence of the negligence and carelessness of the conductor and brakeman in not assisting her off the train she stepped, or fell into a hole in the platform and was injured.

The answer was a general denial of all the material allegations of the complaint.

The questions of law discussed in the briefs of counsel relate to the refusal of the court to submit to the jury two interrogatories propounded by the defendant; to the refusal to give instructions asked by defendant; and to the action of the court in making an oral modification of one of the charges to the jury, after having been requested to put its charges in writing.

These questions we will consider in their order.

Interrogatories were submitted to the jury and answered as follows:

"1. Q. Was it daytime or night-time when plaintiff stepped off defendant's train at Mitchell? A. Daytime.

"2. Q. Did plaintiff look to see the condition of the platform before she stepped upon it? A. She did not.

"3. Q. Was the condition of the platform at Mitchell, upon which plaintiff stepped, open to view? A. Yes.

"4. Q. What was there to have prevented plaintiff from seeing the condition of the platform before she stepped upon it? A. Nothing."

The interrogatories asked and refused were as follows:

"11. Q. If plaintiff did not look to see where she was

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stepping when she alighted, what reason or excuse was there for her not doing so?

"12. Q. If you answer question eleven affirmatively, if there was any other reason or excuse, state fully what it was."

We are of the opinion that the court did not err in refusing to submit these interrogatories to the jury. The court did submit interrogatories calling for particular questions of fact, that seem to have been sufficient to call out generally the facts surrounding the happening of the accident, and we may assume that other interrogatories calling for other particular facts would likewise have been submitted if prepared and tendered in season. The interrogatories refused do not comply with the requirement of the statute providing that the jury, in case they render a general verdict, may be required "to find specially upon particular questions of fact, to be stated in writing."

It has been frequently held that this does not contemplate a finding upon the whole matter in issue (*Uhl v. Harvey*, 78 Ind. 26), nor an issue in the case (*Todd v. Fenton*, 66 Ind. 25), nor one calling for a conclusion of law (*Louisville, etc., R. W. Co. v. Worley*, 107 Ind. 320; *Chicago, etc., R. R. Co. v. Ostrander*, 116 Ind. 259), nor for mingled questions of law and fact. *Town of Albion v. Hetrick*, 90 Ind. 545; *Louisville, etc., R. W. Co. v. Pedigo*, 108 Ind. 481.

In order to answer the interrogatories, it would have been necessary for the jury to have determined what, under all the circumstances, would have been a reason or excuse for not looking. This determination of what would have been a reason or excuse for not looking, necessarily involves a question of law which can not be submitted to a jury by an interrogatory.

The failure of the court to give the *fifth* and *eleventh* instruction asked by the defendant was made a ground

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for which a new trial was asked. These instructions are as follows:

"5 The rule of law is that any one who seeks or accepts transportation by railway or other means, necessarily more or less accompanied with danger, must exercise ordinary care for their own safety while being so transported, or in taking passage on or leaving trains.

"They must exercise the faculties which they possess. If there is an apparent defect about the appliances with which they come in contact, or which are in use, they must look; and unless some reasonable excuse is given, they are guilty of negligence if they do not look."

"11. If there was a hole in the platform, at the point where the plaintiff alighted, and if in the exercise of ordinary care in alighting, she could and should have seen it, and she could by seeing it have avoided any injury, and she failed to see it, you must find for the defendant."

By the *fifth* instruction a traveller who intrusts himself to the care of a carrier for transportation is, as to the duty of inspection and care, placed in substantially the same condition as that occupied by a servant engaged in the master's service. The positions occupied by these two classes are essentially different, and in this difference lies the vice of the instruction.

That it is the duty of a railway carrier of passengers to provide for the safe entry and exit of its patrons from its cars, including the proper care of its depots, platforms and approaches has been recently held in the well considered cases of *Louisville, etc., R. W. Co. v. Lucas*, 119 Ind. 583; *Lucas v. Pennsylvania Co.*, 120 Ind. 205; *Pennsylvania Co. v. Marion*, 123 Ind. 415; *Liscomb v. New Jersey, etc., Co.*, 6 Lans. 75; *Toledo, etc., R. W. Co. v. Grush*, 67 Ill. 262; *Hutchinson Carriers* (2 ed.), sections 516, 517.

In order to make a passenger using a platform guilty of contributory negligence, the defect must be such as would naturally suggest to one of common understanding

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that it was dangerous, and such as to place one in peril to pass over it to and from a train.

In *Brassell v. New York, etc., R. R. Co.*, 84 N. Y. 241, it is said :

“ A passenger, when taking or leaving a railroad car at a station, has the right to assume that the company will not expose him to unnecessary danger ; and while he must himself exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them a safe passage to and from the train.”

In the case from which we have quoted, the plaintiff, who was a passenger, got off a car and started to leave by passing across another track of defendant, when she was run down and killed by an approaching train. The evidence tended to show that she did not look to the east, from which direction the train was approaching, and that if she had looked she could have seen it in time to have avoided injury. The court refused to charge that the failure of the deceased to look to the east before going upon the track was in law negligence upon her part. On appeal, this ruling was sustained, the court saying :

“ The fact that the deceased did not look for the approaching train was a material and important fact to be considered by the jury upon the point of contributory negligence ; but her omission to do so was not in law decisive against a recovery.”

To the same effect see *Terry v. Jewett*, 78 N. Y. 338 ; *Murphy v. New York, etc., R. R. Co.*, 88 N. Y. 445 ; *Lent v. New York, etc., R. R. Co.*, 120 N. Y. 467.

We are satisfied that a passenger upon a railway train has a right to confidently rely upon the care and watchfulness of the carrier to make all things safe for his transportation, with its necessary incidents. While passively submitting himself to its care during the journey, or while entering upon or leaving its cars in the usual place and

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ordinary time and manner, he is not to be deemed guilty of negligence, unless knowledge of a defect or peril is thrust upon him, and he then fails to use ordinary care to avoid injury.

The *eleventh* instruction asked by the defendant is less objectionable than the *fifth*, but casts upon a passenger the use of a degree of care in looking for defects which they, under the circumstances, are not required to exercise. It is also objectionable for failing to limit the duty of avoiding injury to such as would result from the use of ordinary care and skill.

The defect in the platform may have been visible to a passenger alighting from a train, but may not have appeared to be dangerous or likely to cause injury.

Complaint is made of the refusal of the court to give the following instruction :

"13. You can not consider the allegations of the complaint as to the duty of defendant's employes to assist plaintiff to alight; for there was in this case no legal duty resting upon them."

The latter part of this instruction is quite indefinite, but assuming that the instruction contained a correct statement of the law under the evidence, it was not error to refuse it.

We find in the record instructions upon the subject that were given to the jury quite as favorable to the appellant as the one refused.

The defendant requested the court to reduce its instructions to writing, which was done; but during the reading of the same to the jury, and after reading one of its instructions, the court stopped and said: "That is not correct; I'll read that again," and thereupon re-read said instruction.

Every statement or remark made by a court during the time consumed in delivering its charge to the jury is not necessarily a part of its instruction. A statement not

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bearing upon questions of law or fact involved in the issue is not to be taken as a part of the instruction. *McCallister v. Mount*, 73 Ind. 559; *Lawler v. McPheeters*, 73 Ind. 577; *Hasbrouck v. City of Milwaukee*, 21 Wis. 219; *Lehman v. Hawks*, 121 Ind. 541.

We do not understand the remark made by the court to refer to anything contained in the instruction being read, but to some mistake in reading it. The statement "I'll read that again," shows that by a second reading the court proposed to correct the mistake referred to. This was consistent with the idea of a mistake in the first reading, but would have been a repetition, not a correction, of the instruction deemed erroneous.

We find no error in the record.

Judgment affirmed.

Filed Oct. 25, 1892.

No. 16,758.

RANDALL v. THE STATE.

CRIMINAL LAW.—*Prosecution for Petit Larceny.*—*Description of Money in Indictment.*—In a prosecution for petit larceny, for the theft of money, an allegation in the indictment that the defendant "did then and there unlawfully and feloniously steal, take and carry away six dollars in money, of the value of six dollars," furnishes a sufficient description of the alleged stolen property under section 1750, R. S. 1881. While it is not competent for the Legislature to dispense with all description, it is competent for it to prescribe rules for the description of property in such cases, and to declare what shall be a sufficient description.

SAME.—*Character Witness.*—*Cross-Examination of.*—*Discretion of Court.*—

Where a witness had testified to a knowledge of the character of the accused, and that it was good, the extent to which the cross-examination may be carried rests largely within the discretion of the trial court. It can not be said that there was an abuse of such discretion in permitting a character witness for defendant, charged with petit larceny, to testify on cross-examination that he had heard that

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140	370
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the defendant had previously been arrested in another county on a charge of malicious trespass, and that he had learned that the accused had been convicted, fined and imprisoned for shooting a turkey.

SAME.—Evidence.—Improper Conduct of Prosecuting Attorney.—When not Reversible Error.—Where the prosecuting attorney in two instances propounded questions to witnesses (one of the witnesses being the accused) on cross-examination relating to matters plainly irrelevant and improper, the tendency of which would be to prejudice the minds of the jury against the accused, and objection was promptly interposed and sustained by the court, and thereupon the prosecutor, in the presence and hearing of the jury, stated that he expected to prove by the answers the facts detailed in the improper question, his action, while improper, was not such an irregularity as to justify a reversal of the judgment.

SAME.—Instruction to Jury.—Testimony of Accused.—Weight to be Given to.—Where the court in one instruction told the jury that in considering the weight to be given to the testimony of the accused they might take into consideration that he was such defendant, and to what extent, if any, this fact should detract from the credibility otherwise due his testimony, and in another instruction told them that they had no right to disregard the testimony of the defendant on the ground alone that he was the defendant, and that the law presumed him to be innocent until he was proven guilty beyond a reasonable doubt, and that the law allowed him to testify in his own behalf, and that the jury should fairly and impartially consider his testimony, together with all the other evidence, there was no available error.

From the Huntington Circuit Court.

G. A. Yopst and B. M. Cobb, for appellant.

W. A. Branyan, for the State.

McBRIDE, C. J.—The appellant was tried on a charge of petit larceny and convicted.

He asks a reversal upon the ground that the court erred in overruling a motion to quash the information, and in overruling his motion for a new trial. Other errors are assigned, but not discussed. The information is as follows:

“William A. Branyan, prosecuting attorney in and for the 28th judicial circuit of Indiana, now gives the Huntington Circuit Court to understand and be informed that David Randall, on the 31st day of April, A. D. 1892, at and in said

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county and State aforesaid, did then and there unlawfully and feloniously steal, take and carry away six dollars in money, of the value of six dollars, then and there, and being then and there the personal goods, money and chattels of William Powers. And the said Randall was heretofore convicted of petit larceny in the Wells Circuit Court, in Wells county, in said State, as William Powers has complained upon oath.

(Signed)

WILLIAM A. BRANYAN,
Prosecuting Attorney.

The appellant insists that the information is insufficient to charge a public offence because it contains no allegation of "the kind of money which it is claimed was stolen."

This counsel argue is necessary to a description of the alleged stolen property, and that without it there is no description.

The Bill of Rights (article 1 of the Constitution, section 58, R. S. 1881) guarantees to those accused of crime the right "to demand the nature and cause of the accusation against him." This constitutional provision requires that one accused of larceny be informed by the indictment or information of what property the larceny is alleged to have been committed.

A statute which should attempt to dispense with any description whatever of the property alleged to be stolen would be void, and an indictment or information purporting to charge larceny that contained no description of the alleged stolen property would not charge a public offence.

Section 1750, R. S. 1881, prescribes that in indictments and informations it shall be sufficient to describe money, bank bills, or notes, United States Treasury notes, etc., "simply as money, without specifying any particular coin, note, bill, or currency." The information before us complies with this statutory requirement, and is sufficient. While it is not competent for the legislature to dispense with all description, it is competent for it to prescribe rules for the descrip-

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tion of property in such cases, and to declare what shall be a sufficient description. *Riggs v. State*, 104 Ind. 261; *Lewis v. State*, 113 Ind. 59; *Graves v. State*, 121 Ind. 357; *McCarty v. State*, 127 Ind. 223.

The accused called one J. F. France as a witness for the defence, who, having testified to acquaintance with the accused, was asked the following question: "You may state if you are acquainted with his character for honesty and the proper respect for the property rights of others in that locality where he formerly lived?" The witness answered: "I think that I was at the time he resided there."

In answer to the question as to what that character was, whether good or bad, he answered, "It was good as far as I know."

The witness was cross-examined at considerable length, and among other things testified to having heard of the arrest of the accused once on a charge of surety of the peace, and once on a charge of house-breaking. He was then asked if he had not heard that he had previously been arrested in another county on a charge of malicious trespass. The question was answered in the affirmative. Over seasonable objection made by the accused, the witness further testified in that connection that he had learned that the accused had been convicted, fined and imprisoned for shooting a turkey. This it is urged was erroneous. The witness having testified to a knowledge of the character of the accused, and that it was good, it was proper, by cross-examination, to develop the extent of his knowledge of his character and the facts upon which his opinion was based. That the jury might properly weigh his estimate of character it was right that they be fully informed of the facts within the knowledge of the witness which led him to the formation of that estimate.

The extent to which the cross-examination might be carried rested largely in the discretion of the trial court, and we can not say that there was such abuse of that discretion

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as would justify a reversal. *McDonel v. State*, 90 Ind. 320; *Wachstetter v. State*, 99 Ind. 290.

A cross-examination of a witness under such circumstances is in the nature of a trial of the witness. The facts thus developed had no bearing on the question of the guilt or innocence of the accused, save as they may have tended to shake or sustain the credibility of the witness, or to weaken or strengthen his estimate of the character of the accused.

During the cross-examination of this witness the prosecuting attorney propounded a question relating to matters plainly irrelevant and improper, the tendency of which would be to prejudice the minds of the jury against the accused.

Objection was promptly interposed, and sustained by the court. Thereupon the prosecutor, in the presence and hearing of the jury, stated that he expected to prove by the answer the facts detailed in the improper question. To this action of the prosecutor the appellant at the time objected and excepted, and it is assigned as a reason for a new trial.

The same action was taken by the prosecutor while cross-examining the accused, who testified as a witness in his own behalf.

The action of the prosecutor was improper, and should have met with a prompt rebuke from the court. While the course pursued by him is not uncommon, it should never be tolerated. It is an indirect method of reaching and influencing improperly the minds of jurors by a suggestion of the existence of facts prejudicial to the defendant, which the court has by its ruling already adjudged to be incompetent and improper. We can not say, however, in the case at bar, that the irregularity was sufficient to justify a reversal of the judgment.

The court, at the instance of the prosecutor, gave to the jury the following instruction: "Under section 1803, R. S. 1881, the State has introduced some evidence of the defendant's general moral character, for the purpose of affecting

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his credibility as a witness. The defendant has seen fit to become a witness in his own behalf, and it is proper for you in weighing his evidence to take into consideration such impeaching testimony in determining whether or not the defendant under all the circumstances of the case can be believed. In determining the weight which should be attached to the testimony in his own behalf, of a defendant in a criminal prosecution, the jury may take into consideration the fact that he is such defendant, and to what extent, if any, this fact should detract from the credibility otherwise due his testimony." To the giving of this instruction the accused objected and excepted. The court, upon its own motion, gave the following additional instruction relating to the same subject: "I instruct you that you have no right to disregard the testimony of the defendant, on the ground alone that he is the defendant, and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proven guilty beyond a reasonable doubt, and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony, together with all the other evidence. And if the jury have a reasonable doubt that the defendant is guilty as charged in the affidavit and information, then you should give the defendant the benefit of the doubt and acquit him."

Taking the two instructions together, and considering with them the additional instruction given by the court, we find nothing sufficient to justify a reversal. The instructions as a whole are quite as favorable to the accused as he could ask.

We can not reverse the judgment on the evidence. After a careful examination of the entire record, and giving due weight to every alleged error, we conclude that the judgment of the circuit court should be, and it is affirmed.

Filed Oct. 27, 1892.

Henshaw *et al.* v. The People's Mutual Natural Gas Company.

No. 15,888.

**HENSHAW ET AL. v. THE PEOPLE'S MUTUAL NATURAL
GAS COMPANY.**

INJUNCTION.—*Natural Gas.—Grant of Free Use of.—Improper Action of Officers of Corporation.*—Where the president and secretary of a natural gas company, with the consent of one S., who was a director of the company, but against the will and without the consent of the board of directors, granted to D. the right to take gas from the well of the company free of charge, to be used by him in his business, an injunction will lie against said D. and the officers of the company who granted the privilege to him to prevent such use of the gas.

From the Madison Circuit Court.

J. B. Orr and B. McMahan, for appellants.

J. W. Lovett and S. M. Keltner, for appellee.

COFFEY, J.—The People's Mutual Natural Gas Company was incorporated for the purpose of supplying its stockholders and others with natural gas.

After its incorporation it sunk a well upon a small tract of land owned by it, and proceeded to carry out the objects for which it was incorporated.

The affairs of the company are managed by seven directors. At the time of the grievances set out in the complaint the appellant Samuel Cassel was president, Seth B. Henshaw was secretary, and Perry Heritage was the treasurer. Without the consent or direction of the directors the appellants, Cassel and Henshaw, as president and secretary, with the consent of the appellant Sherman, who was a director, granted to John W. Davis the right to take gas from the well of the appellees, free of charge, to be used by him in burning brick at his brick-yards. He was about to tap the well for that purpose when this action was brought in the Madison Circuit Court for the purpose of enjoining him and the appellants from so doing. Upon a trial of the cause a

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perpetual injunction was granted. Davis having died, his administrator declined to join in this appeal.

The only matter urged for a reversal of the judgment is that the evidence in the cause does not sustain the finding of the court.

We think there can be no doubt as to the correctness of the finding and decree of the court as to Davis. He had no right to take the gas of the appellant, which was its property, without compensation, against the will and without the consent of the directors. The consent of the appellants gave him no such authority. In determining whether the decree should have been against the appellants also it must be remembered that they and Davis were joint wrongdoers. It was proper practice, therefore, we think, to sue them jointly. It is not true, as assumed by them, that in granting to Davis the privilege of taking the appellee's gas without compensation they had done all that they could or intended to do. They, as a part of the representatives of the company, were still consenting to this wrongful appropriation of the property which they held as trustees of the stockholders of the corporation. For these reasons, among others that could be given, we think it was proper to render a joint decree against them and Davis to prevent the threatened wrong set out in the complaint.

Judgment affirmed.

Filed Nov. 2, 1892.

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133	319
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No. 15,968.

IREY ET AL. v. MARKEY ET AL.

STATUTE OF LIMITATIONS.—*Possession under Void Deed.—Color of Title.—*
Coverture.—Possession under a void deed is sufficient to give color of title, as against the grantors, and to set in motion the statute of limitations, and the coverture of the appellant, who was the grantor, does not affect the question.

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SAME.—*Quieting Title.*—An action to quiet title to land is governed by section 294, R. S. 1881, and must be brought within fifteen years.

From the Huntington Circuit Court.

A. Taylor, for appellants.

J. B. Kenner and *U. S. Lish*, for appellees.

MCBRIDE, C. J.—Suit to quiet title to land and for partition. Two answers remaining in the record as it comes to us are: That the plaintiffs' cause of action did not accrue within fifteen years prior to the commencement of the suit, and that the cause of action did not accrue within twenty years prior thereto. The appellants were plaintiffs below, and by way of reply pleaded substantially the following facts: That on the 2d day of September, 1861, one Amos Parrett died intestate, owning the land in controversy. He left surviving him the appellant, who was his widow, and several children, who still survive. Administration was had of his estate, and the undivided two-thirds of the land was sold by order of court to pay debts of the estate, the deed being delivered to the purchaser October 1st, 1864. Prior to the sale the widow was married to her co-appellant, Jonah Irey, and has ever since been and still is his wife. After such marriage she, with her said husband, assumed to sell the undivided one-third of the land which descended to her as such widow, and on the 14th day of October, 1864, they together executed a deed therefor to one Aaron McKinney, who was also the purchaser of the undivided two-thirds at the administrator's sale. McKinney entered into possession of the land under the two deeds. The appellee is the grantee of McKinney, and is in possession. The possession of McKinney and of the appellee has been continuous since October 14th, 1864, the date of the appellants' deed for the undivided one-third of the land.

The appellants contend, as we understand them, that the deed for the undivided one-third, being executed in violation of the statute, was void, and that no rights could be acquired

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under it; that the appellant Mary is, notwithstanding its execution, still owner of the undivided one-third, and tenant in common with the appellee; that the possession has been merely the possession of a co-tenant, and not adverse.

Assuming that the deed was void, possession having been taken under it, it was sufficient to give color of title as against the grantors, and to set in motion the statute of limitations.

The coverture of the appellant does not affect the question, as she has at all times, since the execution of the deed, been empowered by statute to sue in her own name, and alone, in all cases where the action concerned her separate property. 2 G. & H. 41 (R. S. 1881, section 254); and, since the revision of the statutes in 1881, coverture has not been a "legal disability."

An action to quiet the title to land is governed by the provisions of section 294, R. S. 1881, and must be brought within fifteen years. *Caress v. Foster*, 62 Ind. 145; *Dewiler v. Schultheis*, 122 Ind. 155.

The reply failed to show any fact sufficient to avoid the answer. Of course, if it was not sufficient to avoid the answer of the fifteen years' statute, it was for the same reasons bad as to that pleading the twenty years' statute.

There is no error in the record.

Judgment affirmed, with costs.

Filed Nov. 4, 1892.

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138	263

No. 15,899.

WINSTANDLEY v. STIPP, GUARDIAN.

FRAUDULENT CONVEYANCE.—Pleading.—*Necessary Averment.*—A cross-complaint based upon the theory that a conveyance is fraudulent, is bad if it does not aver that, at the time it was executed, the grantor had no other property subject to execution.

ADVERSE POSSESSION.—Officer.—*Writ of Attachment.*—*Conveyance by Grantor*

Winstandley v. Stipp, Guardian.

Out of Possession.—The possession of an officer of the law under a writ of attachment is not adverse possession in the true sense of the term so as to avoid a conveyance made by a grantor out of possession.

From the Lawrence Circuit Court.

J. H. Willard, for appellant.

ELLIOTT, J.—The appellee brought this suit to secure the partition of lands, acting upon the theory that they were owned by his wards and the defendants, Rachel Adams and Robert N. Palmers, as tenants in common. The controversy in the case is between Winstandley, Robert N. Palmer, George W. Adams and Nauie S. Adams. The argument of counsel is addressed to the rulings on the demurrers directed to the cross-complaint of Winstandley, so that we are not required to notice the specifications in the assignment of errors based upon other rulings.

It is alleged in the first and second paragraphs of Winstandley's cross-complaint that he brought an action in the Lawrence Circuit Court against George W. Adams, who was at the time the owner of an undivided one-third of the land; that an attachment was duly issued and levied upon the interest of Adams; that prior to the rendition of the judgment in the action Adams fraudulently conveyed the property to Robert N. Palmer, and that at the time the conveyance was executed the land was in the possession of the sheriff under the writ of attachment.

The cross-complaint can not be sustained upon the theory that the conveyance was fraudulent. This is so for the reason, among others, that it does not aver that at the time it was executed the grantor had no other property subject to execution. It is established law that a party who assails a conveyance as fraudulent must aver that the grantor had no other property subject to execution at the time the execution was issued as well as at the time the conveyance was executed. *Sell v. Bailey*, 119 Ind. 51, and cases cited;

 Blackwell *et al.* v. Pendergast.

Hartlepp v. Whiteley, 129 Ind. 576 ; *Shew v. Hews*, 126 Ind. 474.

We are not required to decide whether the pleading can be sustained upon the ground that Winstandley had such an interest by virtue of his attachment as would defeat the appellee, for no such claim is made. The only grounds upon which the appellant seeks to sustain the cross-complaint are that the conveyance was fraudulent, and that the conveyance is void because made by a grantor out of possession. One of these grounds we have already considered and disposed of, and the other we now dispose of by adjudging that the rule, conceding it to be the same as at common law, does not apply to a case where possession is held by an officer under a statutory writ of attachment issued at the suit of a creditor to enforce a debt due from the grantor. The possession of an officer of the law under such a writ is not adverse in the true sense of the term. We have not considered the effect of the statute, although it properly exerts an important influence upon the question. Section 1073, R. S. 1881.

Judgment affirmed.

Filed Nov. 5, 1892.

 No. 15,984.

BLACKWELL ET AL. v. PENDERGAST.

PLEADING.—*Action on Written Instrument.—Failure to File Exhibit.—Demurrer.*—The statute which requires a copy of the original of an instrument of writing upon which a pleading is founded to be filed with the pleading, is imperative; and where the pleading avers that a copy is filed, but no copy is found in the record, the pleading is bad on demurrer.

From the Porter Circuit Court.

W. E. Pinney, for appellants.

P. Grumpacker and *S. C. Spenoer*, for appellee.

Geddes *et al.* v. Blackmore.

MILLER, J.—This action was instituted by the appellee against the appellants upon a promissory note and for the foreclosure of a mortgage. The complaint avers that copies of the note and mortgage are made parts of the complaint, but no copy of either instrument appears in the record.

The defendants demurred to the complaint, the demurrer was overruled and excepted to, and this ruling is properly assigned as error in this court.

The statute, section 362, R. S. 1881, which requires a copy, or the original, of an instrument of writing upon which a pleading is founded to be filed with the pleading is imperative, and where a pleading avers that a copy is filed but no copy is found in the record, the pleading will not be good as against a demurrer. *Old v. Mohler*, 122 Ind. 594; *Overy v. Tipton*, 68 Ind. 410; *Brown v. State, ex rel.*, 44 Ind. 222; *Ashley v. Foreman*, 85 Ind. 55; *Douglass v. Keehn*, 71 Ind. 97; *Montgomery v. Gorrell*, 51 Ind. 309; *Seawright v. Coffman*, 24 Ind. 414.

The court erred in overruling the demurrer to the complaint.

Judgment reversed.

Filed Nov. 4, 1892.

No. 15,962.

GEDDES ET AL. v. BLACKMORE.

PROMISSORY NOTE.—*Signing of in Blank.—Negotiation of, Contrary to Instructions.—Payor Bound Thereby.*—Where a person signs his name to a blank note and intrusts it to another, he thereby gives such person authority to fill it up in any manner he pleases, not inconsistent with the character of such blank paper, and a party taking it will be protected, even if the express instructions of the payor were disobeyed, and the note used for another purpose than that for which it was intended. The fact that the party intrusted with the blank note also signed it as maker before negotiating it, will not relieve the party who originally signed the blank note.

Geddes et al. v. Blackmore.

SAME.—*Notice of Violation of Instructions.*—*What is not.*—The fact that the payee of the note knew on the day he advanced the money thereon that the party who signed it in blank was in town, and he did not say anything to him about the loan, would not convey notice to the payee of the unauthorized use of the paper.

SAME.—*Finding of Jury.*—*Conclusion from Other Facts Found.*—Where the jury found all the facts relating to the signing of the note, filling in of blanks, instructions, etc., and at the close of the verdict found that the defendant did not execute the note, the latter finding being a mere conclusion drawn from the other facts found, will be disregarded.

From the Greene Circuit Court.

W. W. Moffett and C. E. Green, for appellants.

OLDS, J.—The appellee, Charles Blackmore, brought this action against the appellant, Daniel T. Geddes, and William Winder, on a promissory note, dated August 15th, 1884, due in one day after date, payable to said Charles Blackmore, for \$1,000, with eight per cent. interest, and signed by said Daniel T. Geddes and William Winder. Geddes was defaulted, and Winder answered in three paragraphs: 1st. A general denial. 3d. A general plea of *non est factum*, and, 3d. Setting up an alteration of the note.

There was a trial by jury and a special verdict returned. The facts found by the jury in their special verdict show that the appellant William Winder signed a printed blank form of promissory note. The date of the note, date of maturity, amount and name of payee all being blank, and intrusted it to Geddes, with verbal instructions to purchase hogs for a firm composed of said William Winder and Asbury Winder, and to fill the blanks in the note and deliver the same to the person from whom he purchased hogs, filling the dates. The amount and name of the payee were to be filled by inserting the amount to be paid for the hogs, and the name of the person from whom the hogs were purchased. Geddes violated his instructions and used the note to borrow \$1,000 of appellee, Blackmore, filling the blank amount at \$1,000 and the name of Blackmore as

Geddes *et al.* v. Blackmore.

payee. He filled the other blanks, and signed the note himself as one of the payors, delivered the same to Blackmore, and received from him \$1,000. Geddes purchased no hogs of Blackmore, and did not use any of the money for the purchase of any hogs for said William Winder or the firm of Winder & Winder, and neither Winder & Winder nor William Winder received any of the money; that the use made of the note was unauthorized by Winder and was without his knowledge and contrary to his instructions. Both the appellee and the appellant Winder moved for judgment on the special verdict, and the court overruled the motion of Winder and sustained the motion of the appellee, Blackmore, and rendered judgment in his favor for the amount found due on the note.

These rulings of the court on the motions for judgment are assigned as errors.

The facts found show that Geddes violated the confidence reposed in him by appellant Winder. He disobeyed his instructions, and used the note for another purpose than that for which it was intended, but notwithstanding such violation of confidence the appellant is liable on the note.

In *Roberts v. Adams*, 8 Porter, 297 (33 Am. Dec. 291), the court says: "No rule can be better settled, than the one which determines that he who signs his name to a blank piece of paper, with intent to be filled up as a note or endorsement, will be liable, although the person intrusted therewith shall violate the confidence reposed in him, by filling it up with another sum, or using it for another purpose than the one intended," and many authorities are cited in support of this doctrine. The same rule is adhered to by this court. In *Wilson v. Kinsey*, 49 Ind. 35, it was held that where a party signed a promissory note in blank, and intrusted it to another to discount the note at bank, a blank being left for the name of the payee, and the note was negotiated to a third party, and his name inserted as payee, the person so signing the note was liable. In that case Kinsey signed the note

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and intrusted it to one Butler to negotiate, and the court says: "We do not doubt, in view of the evidence, that when the note was signed Butler intended to negotiate it at the bank, but we find no evidence of any agreement between him and Kinsey that he should not negotiate it elsewhere. Had Kinsey insisted upon any such thing, it seems probable that when the subject of restricting the authority of Butler was under consideration, he would have insisted upon having the blank for the name of the payee filled, as well as the ones which he insisted on having filled, before he parted with the paper. This he did not do, but permitted the paper to go out into the market as it was. In that condition, it fell into the hands of Wilson, who paid value for it, and who, as we think, is not charged with notice of anything which can affect his right to recover upon the note." *Cornell v. Nebeker*, 58 Ind. 425, supports the same doctrine.

In this case Geddes was not restricted to fill in the name of any particular person as payee or to any amount. It is true he was intrusted with the note for the purpose of filling in the blanks, and to negotiate it in payment of hogs to be purchased by him for the firm of Winder & Winder; but he was intrusted with the blank with authority to fill the blanks and negotiate it for a particular purpose, and he violated the confidence reposed in him, and negotiated it for another purpose. Winder, by the signing of the note in blank, and entrusting it to Geddes to fill the blanks and negotiate it, placed it in the power of Geddes to accomplish just what he did accomplish, viz., fill the blanks and negotiate it to Blackmore, and secure a loan of one thousand dollars, and the rule seems to be well settled that where a person signs his name to a blank note, and entrusts it to another, he thereby gives such person authority to fill it up in any manner he pleases, not inconsistent with the character of such blank paper, and a party taking it will be protected. See *Davis v. Lee*, 59 Am. Dec. 267; *Abbott v. Rose*, 62 Me. 194 (16 Am. Rep. 427).

Nor do we think Winder was relieved from liability by

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reason of the fact that Geddes signed his own name to the note as one of the payors or makers. Winder, by intrusting the note to Geddes, authorized him to fill the note out in any manner he pleased, not inconsistent with the character of such blank. The filing of it as he did and signing his own name with that of Winder as payee was perfectly consistent with the character of the blank so signed by Winder. It enabled Geddes to do just what the facts found show that he did do. He first met Blackmore on the street, and informed him that he would probably want to make the loan of him on a note signed by Winder, then filled the blanks and signed it himself, and negotiated it and obtained the money upon it. The fact is found that on the same day Winder was also in town and that Blackmore knew it and made no mention of the fact in regard to the loan to Winder, but this fact carries no notice to Blackmore of the unauthorized use of the paper, but rather conveys to him knowledge that Winder was within reach so that Geddes could and had procured his signature for the purpose of the loan.

There is a general finding at the close of the verdict that Winder did not execute the note, but in view of the form of the verdict this must be treated as a mere conclusion drawn from the other facts found, as all the facts relating to the signing, delivery, filling blanks, and knowledge and instructions are fully set out and found by the jury, and it is clearly apparent that the latter statement is intended as a conclusion drawn from the facts previously stated and found by the jury.

We think there was no error in the rulings of the court on the motions for judgment.

Judgment affirmed, with costs.

Filed Nov. 15, 1892.

 Shewalter v. Bergman.

No. 14,581.

SHEWALTER v. BERGMAN.

BILL OF EXCEPTIONS.—*When Not Properly Part of Record.*—Where a bill of exceptions was filed relating to the rulings of the court on the admission and exclusion of evidence, but which did not purport to include all the evidence given on the trial, and ten days later, after the motion for a new trial was overruled, the defendant was granted sixty days within which to file his bill of exceptions, and several months afterwards an entry recited that the reporter's long-hand manuscript of the evidence was filed on that date and incorporated in the bill of exceptions as a part of the transcript, and what purported to be a bill of exceptions containing the evidence, was attached to the transcript, which bore the file-mark of the clerk, but was without his authentication, the evidence is not a part of the record of the cause, and questions upon the admissibility of evidence and the correctness of the instructions given and refused, are not available on appeal. It does not appear that the bill of exceptions was ever filed as a part of the cause as required by section 629, R. S. 1881.

From the Jay Circuit Court.

C. Corwin, J. M. Smith, T. Bosworth, F. Snyder, H. C. Fox and J. F. Robbins, for appellant.

W. A. Thompson, A. O. Marsh, J. W. Thompson, W. H. Williamson, J. Bailey and C. E. Walters, for appellee.

MILLER, J.—The only one of the several errors assigned which is presented for our consideration relates to the action of the court in overruling the appellant's motion for a new trial.

The appellee makes the point, and renders it necessary for us to determine, whether the evidence given on the trial of the cause is in the record.

We are informed by the transcript that, on the 17th day of February, 1888, at the close of the trial, the defendant, who is the appellant here, tendered to the court his bill of exceptions No. 1, and the same was signed, sealed and made part of the record on that day.

This bill of exceptions relates to the rulings of the court

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42	679
43	365
13	448
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45	217
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55	17
32	556
157	188

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on the admission and exclusion of evidence, and does not purport to include all the evidence given on the trial. On the 27th day of the same month, and after the motion for a new trial had been overruled, an entry appears to have been made in the order book granting the defendant sixty days within which to file his bill of exceptions. Immediately following this entry, as shown by the transcript, follows the certificate of the clerk, which contains the only authentication to the correctness of the transcript, in these words:

"State of Indiana, Jay county, ss.: I, William S. Fleming, clerk of the Jay Circuit Court, in said State, do hereby certify the above and foregoing transcript contains true and complete copies of all the papers and entries in said cause. I further certify that, on the 2d day of August, 1888, the official reporter who took down the evidence in said cause, filed in my office his long-hand manuscript thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions made part of the foregoing transcript.

"In witness whereof I hereunto set my hand and affix the seal of said court, at the city of Portland, this 2d day of August, 1888. W. S. Fleming, clerk of the Jay Circuit Court."

This is followed by the assignment of errors, signed by the attorneys of the appellant.

We then find attached to the transcript what purports to be a bill of exceptions containing the evidence, and bearing the file-mark of the clerk of the Jay Circuit Court. There is no authentication of this annex to the transcript whatever.

Another and equally fatal objection is that except for the file-marks above referred to, it does not appear that the bill of exceptions was ever filed as a part of the cause, as required by section 629, R. S. 1881. *Shulse v. McWilliams*, 104 Ind. 512; *Stewart v. State*, 113 Ind. 505; *Loy v. Loy*, 90 Ind. 404; *Hessian v. State*, 116 Ind. 58.

We conclude that the objection made by the appellee is

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well taken, and that, consequently, the evidence is not a part of the record of this cause.

Without the evidence, the question upon the admissibility of evidence and correctness of the instructions given and refused are not before us in such form as to be available to the appellant. *Stevens v. Stevens*, 127 Ind. 568.

Judgment affirmed.

Filed April 2, 1891; petition for a rehearing overruled Jan. 30, 1892.

No. 15,915.

THE CITY OF FORT WAYNE v. THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

MUNICIPAL CORPORATIONS.—Right to Alienate Property.—Limitation of.—A municipal corporation possesses the implied right to alienate its property, real or personal, of a private nature, unless restrained by charter or statute, but it can not dispose of property of a public nature in violation of the trust upon which it is held. There is a distinction between property purchased for a public use, and not yet dedicated, and property purchased for that purpose and actually dedicated to that use. A deed which vests title to property in a municipal corporation may be of such a character as to dedicate the property to a public use, and where a deed vests the title to property in fee simple in the municipal corporation without limitation or restriction as to its alienation, the corporation has the right, any time before it is dedicated to a public use, to dispose of the property.

SAME.—Deed by to a Railroad Company.—Reservation in.—Where a city, in making a deed to a railroad company, reserved the right to cross the tracks of the company with its streets and alleys when the city should make an addition of certain land, such reservation will not operate in favor of the corporation until it has made such addition. A reservation in a deed can not be extended beyond its terms.

RAILROAD.—Right of Way.—Crossings.—Taking Longitudinally for a Highway.—Railroad companies acquire the right to construct their tracks subject to the dominant right of the State to cross such tracks when the public necessity demands that new roads and streets shall be opened, but the right to take longitudinally is quite a different thing

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from the right to cross, and is governed by different rules. A municipal corporation, in the absence of legislation expressly or by necessary implication authorizing it, can not take a part of the right of way of a railroad company by constructing a public highway longitudinally to the right of way.

SAME.—*Right of Highway to Cross.*—*Limitation of.*—The rule that allows the construction of streets and other public highways across railroad tracks has its limitations. They can not be so constructed when by so doing the railroad company would be unable to use its track at the point of crossing for the purpose for which it was constructed.

LAND.—*Appropriation to Public Use.*—*Diversion to Other Use.*—Where, pursuant to legislation, land is appropriated to an important public use, it can not afterwards be taken for a use wholly inconsistent and different from the first unless such, by express words, or by necessary implication, appears to be the intent of the Legislature.

From the Allen Superior Court.

H. Colerick, for appellant.

G. C. Green, *O. G. Getzendanner* and *J. H. Baker*, for appellee.

COFFEY, J.—This was an action brought by the appellee against the appellant, the city of Fort Wayne, to enjoin the latter from opening a street across the yard and tracks of the appellee situated within the limits of the city. The material facts in the case, as they appear in the special findings of the court, are, that in the year 1866, the city of Fort Wayne acquired a tract of land in fee simple, by purchase and deed, contiguous to the city for the purpose of a public park. The deed to the city contained no limitation nor conditions as to the purpose for which the land was purchased or was to be used, nor did it contain any restrictions as to the power of the city to convey the same. On the 23d day of March, 1869, and before any steps had been taken to convert the ground into a public park, the common council of the city adopted a resolution by the terms of which it granted to the Fort Wayne, Jackson and Saginaw Railroad Company twenty acres of the land off of the west side of the tract, upon the condition that the railroad company should run its line through the tract so granted, and locate its depots for local

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purposes thereon, and also locate any shops it might find necessary to build at Fort Wayne upon the same tract; and upon the further condition that the property and the north side addition to Fort Wayne should become annexed to and become a part of the city of Fort Wayne. The resolution further provided that when the railroad company had complied with the conditions of the grant the mayor of the city should execute to it a deed of conveyance for the land donated. The city also reserved the right to cross the tracks of the appellant whenever it should determine to lay off an addition composed of the remainder of the tract.

The donation of this land was made for the purpose of inducing the railroad company to make the city of Fort Wayne its southern terminus, and to induce it to locate its depots for local purposes and its shops thereon. Prior to February, 1871, the railroad company accepted the donation on the terms and conditions expressed in its resolution, took possession of the land and constructed its road-bed through the same, put in side tracks and switches, and erected a depot building thereon on the faith of the resolution, and located its yards on the ground for making up its trains, storing cars and conducting its business as a passenger and freight railroad, and prior to the 12th day of March, 1872, had expended in so doing several thousand dollars. On the 12th day of March, 1872, the common council of the city passed a resolution directing the mayor of the city to execute to the railroad company a deed for the land, which he accordingly did on the 26th day of the same month.

At the time the first resolution above referred to was adopted, one Edgerton was a member of the common council of the city of Fort wayne, and he was at the same time vice-president of the railroad company.

The common council consisted of sixteen members, nine of whom voted for the resolution and seven against it, Edgerton voting for the resolution; but when the last resolution, directing the mayor to execute the conveyance was

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passed, Edgerton was not a member of the common council. On the 8th day of April, 1873, the common council of the city of Fort Wayne passed a resolution attempting to rescind both the resolutions above mentioned upon the alleged ground that the city had no power to bargain away the land therein described, and upon the alleged ground that the railroad company had not complied with the conditions of the grant. The resolution also required the city attorney to take such steps as might seem to him necessary to avoid the deed executed by the mayor of the city, but so far as appears no action was taken by him. On the 31st day of December, 1879, the Fort Wayne and Jackson Railroad Company succeeded to all the rights of the Fort Wayne, Jackson and Saginaw Railroad Company, and on the 24th day of August, 1882, the Fort Wayne and Jackson Railroad Company leased all its property to the appellee for the period of one hundred years.

By a proceeding instituted for that purpose, regular on its face, the city of Fort Wayne, by its common council, has ordered an extension of Fourth street in said city, so as to cross the yard and tracks of the appellants about two hundred and fifty feet from the south end of the yard. In this proceeding the property was treated as belonging to the city of Fort Wayne, and for this reason neither the appellee nor the railroad companies from which it derives its title were made parties to the proceeding or given any notice thereof in any manner whatever. At the point where Fourth street, if extended, will cross the appellee's yard it has six tracks used for storing cars, weighing cars, making up trains, etc., and by opening Fourth street as proposed it will prevent the weighing of cars, and will render the south end of the yard useless for the purposes for which it was constructed. On an average one hundred and forty cars are handled each day on these tracks, one-half of which belongs to the Fort Wayne, Cincinnati and Louisville Railroad Company, which

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uses this yard as its northern terminus. This latter railroad company has built round-houses and repair shops on the land donated as above by and with consent and aid of the city of Fort Wayne, and it has a contract with the appellee by the terms of which it uses the tracks and depot of the latter in the transaction of its business at Fort Wayne as its southern terminus, and without the use of this yard it can not transact its business. The extension of Fourth street will greatly discommode and diminish the business of the appellee and its yard and station grounds, and impair the value of its property and franchise. By reason of the number of tracks and their necessary use in moving trains and transporting and weighing freight cars it will be dangerous to life and limb for the public to travel on said street extended across the appellee's yard as proposed. In constructing and preparing this yard and depot, there has been expended about the sum of thirteen thousand dollars, and the use of this yard and station is necessary to the appellee in conducting its business at the city of Fort Wayne.

Upon these facts the court stated as a conclusion of law that the appellee was entitled to a permanent injunction enjoining the city of Fort Wayne from extending Fourth street across its yard and tracks at the point described in the complaint.

The correctness of this conclusion, is questioned by the assignment of error upon this appeal.

It is contended by the appellant that the conclusion of law stated by the court is erroneous, for the reasons :

First. That the city of Fort Wayne had no power to donate or convey the land in question for the purpose of a railroad because it was purchased to be used by the people as a public park.

Second. Because Edgerton, who voted for the donation as a member of the common council, was, at the time of so voting, vice-president of the railroad company, and that the donation was for that reason void.

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Third. Because the city, in its grant to the railroad company, reserved the right to cross its tracks.

The general rule is that municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute. 2 Dillon Municipal Corporation (3d ed.), p. 569; *Shannon v. O'Boyle*, 51 Ind. 565; 1 Washb. R. P. (3d ed.) 64; *Reynolds v. Commissioner, etc.*, 5 Ohio, 204; *Beach v. Haynes*, 12 Vt. 15; *Jamison v. Fopiana*, 43 Mo. 565; *Board, etc., v. Patterson*, 56 Ill. 111; *Platter v. Board, etc.*, 103 Ind. 360; *Newbold v. Glenn*, 67 Md. 489.

Municipal corporations can not dispose of property of a public nature in violation of the trusts upon which it is held nor of a public common; but there is a distinction between property purchased for a public common and not yet dedicated, and property which is purchased for that purpose and actually dedicated to that use.

The case of *Beach v. Haynes, supra*, is very much in point here. In that case land had been purchased for a public common, and it was so expressed in the deed of conveyance, but before it was actually dedicated to that use it was conveyed away by the town of Westford, in which was vested the fee simple title, and it was held that such conveyance vested in the grantee a good title. But in the later case of *State v. Woodward*, 23 Vt. 92, it was held that a municipal corporation could not convey away a public common after it had been actually dedicated to the public use. Of course, the deed which vests title in the municipality may be of such a character as to dedicate the property to the public use, but such is not the case here. The deed to the city of Fort Wayne for the land in controversy vested in it the fee simple title without limitation or restriction as to its alienation. Such being the case, we think the city had the power to convey it for private use at any time before it was dedicated as

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a public park. Such seems to be the tenor of all the authorities upon the subject.

We recognize the doctrine announced in the case of *City of Fort Wayne v. Rosenthal*, 75 Ind. 156, as sound, but in that case Rosenthal made a contract with himself, while here the contract was not between Edgerton and the city, but between the city and the railroad company. If that contract depended upon the vote of Edgerton, and there had been no further action taken by the city council, we would have a question quite different from the one here presented, for in this case it appears by the findings of the court that a sufficient number of councilmen voted for the resolution granting the land to the railroad company to pass it without counting the vote of Edgerton, while the deed of conveyance was executed pursuant to a resolution passed by the common council at a time when he was not a member. Treating the first resolution as voidable on account of Edgerton's connection with its adoption, we think the subsequent action of the common council fully ratified it.

The adoption of these resolutions was not a judicial act, but was legislative or ministerial. *Platter v. Board, etc., supra*.

We are unable to perceive how the reservation of the right to cross the tracks of the railroad company in the event the city of Fort Wayne should lay off an addition, can have a controlling influence in this case, for it does not appear that the city has laid out any addition.

The general rule is that a reservation in a deed can not be extended beyond its terms, and the right of the city to cross the railroad track is, by the terms of the reservation, limited to the time when the city shall elect to lay out an addition composed of the remainder of the land held by it under its purchase for a public park. *Nicholson v. Caress*, 45 Ind. 479; 2 Dev. Deeds, section 979; *Jackson v. Hudson*, 3 Johns. 375 (3 Am. Dec. 500).

The question as to whether the city of Fort Wayne, un-

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der present legislation, possesses the power to appropriate the land described in its order for the extension of Fourth street is one of much more difficulty. That there is a broad distinction between taking a part of the right of way of a railroad company for a public street by constructing the street longitudinally, and by taking it by crossing the right of way at right angles, seems to be too plain for controversy. The right to take longitudinally is quite different from the right of crossing, and is governed by entirely different rules. All the authorities are, we believe, to the effect that a municipal corporation, in the absence of legislation expressly or by necessary implication authorizing it, can not take part of the right of way of a railroad company by the construction of a public street opened longitudinally. The decisions so holding rest upon the ground that where property is once dedicated to a public use it can not be taken for another and different public use without express authority. It is not doubted, however, that the Legislature may grant such authority. Private corporations acquire the right to construct roads subject to the dominant right of the State to cross such road whenever the public necessity demands that new roads or streets shall be opened, and for this reason it is held that the general power to construct and open streets or other public highways carries with it the power to construct them across railroad tracks. Elliott Roads and Streets, p. 169; *Lake Erie, etc., R. R. Co. v. City of Kokomo*, 130 Ind. 224; *State v. Easton, etc., R. R. Co.*, 36 N. J. L. 181; *Morris, etc., R. R. Co. v. Central R. R. Co., etc.*, 31 N. J. L. 205; *Baltimore, etc., T. P. Co. v. Union R. R. Co., etc.*, 35 Md. 224; *Little Miami, etc., R. R. Co. v. City of Dayton*, 23 Ohio St. 510; *St. Paul, etc., R. W. Co. v. City of Minneapolis*, 35 Minn. 141; *President, etc., Canal Co. v. Village of Whitehall*, 90 N. Y. 21; *Albany, etc., R. R. Co. v. Brownell*, 24 N. Y. 345.

While the construction of a street or other public highway across a railroad track is generally attended with some

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inconvenience to the company, yet it is not ordinarily inconsistent with the use of the railroad for the purposes for which it was constructed.

But even this rule, which allows the construction of streets and other public highways across railroad tracks, has its limitations.

They can not be so constructed where by so doing the railroad would be unable to use its tracks at the point of the crossing for the purposes for which they were constructed. In other words, the crossing must occur at a point where the use of the highway or street will not deprive the railroad of the use of its tracks. Thus in the case of *Little Miami, etc., R. R. Co. v. City of Dayton, supra*, it was said by the Supreme Court of Ohio: "But where land is appropriated, pursuant to legislative authority, to an important public use, a subsequent grant can not be held to authorize the same land to be taken for a use wholly inconsistent with, and which, in the actual circumstances, must necessarily supersede the former use, unless such appear, by express words, or by necessary implication, to be the legislative intent."

To the same effect is *Albany, etc., R. R. Co. v. Brownell, supra*. In each of these cases there was an attempt to construct highways across the railroad tracks of the companies involved in the controversy.

It appears by the special findings in the case now under consideration that the extension of Fourth street across the tracks and yards of the appellee will prevent the weighing of freight at that point, and will render the south end of the yard useless for purposes for which it was constructed; that it will greatly discommode and diminish the business, and its yard and station grounds, and impair the value of its property and franchise, and that it will be dangerous to life and limb for the public to travel over the street when so extended by reason of the number of tracks and the use to which they are necessarily put.

In view of these facts we are constrained to hold, under

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the authorities cited, that under present legislation the city of Fort Wayne is not authorized to extend Fourth street in the manner contemplated. The use of such a crossing would be destructive of the use of the tracks of the appellee at this point in the manner they are now used. In such case the authority of the municipal corporation to make such a crossing must appear in some statute either expressly or by necessary implication.

Our attention has not been called to any such statute, and we know of none.

There are some other questions in the case of minor importance, but as we have reached the conclusion that the city of Fort Wayne is without power to make the crossing in dispute, they need not be noticed.

We are of the opinion that there is no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed Nov. 5, 1892.

No. 16,625.

IN THE MATTER OF VAN WALTERS ET AL. v. THE BOARD OF
CHILDREN'S GUARDIANS OF MARION COUNTY.

BOARD OF GUARDIANS.—Decree Committing Children to Custody of.—Petition to Set Aside.—Insufficiency of.—Where, by decree of court, the custody of children was taken from the parents and committed to a "Board of Children's Guardians," the decree will not be set aside upon a petition of the parents, which alleged that the children were not at any time neglected, abandoned or cruelly treated or subjected to vicious influences; that the mother of the children was so distracted in mind and so crazed with grief over her children being taken from her that she was at the time incapable of comprehending or doing anything; and that the petitioners were able and willing to take care of the children, and to make reasonable provision for their physical comfort and welfare and to give them a good education. A judgment that has all the attributes of a valid judgment imports absolute verity, and can not be

132	567
158	9

132	567
163	188

132	567
165	407

132	567
170	245
170	247

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successfully avoided by allegations which simply contradict it. Under such an attack it must be conclusively presumed that there was evidence fully justifying the judgment of the court of original jurisdiction.

SAME—Constitutionality of Statute Establishing.—The statute of this State which provides that children may be taken from the custody of parents whose course of life or whose evil conduct unfits them to rear children, and be committed to the custody of a "Board of Children's Guardians" is constitutional. The interests and rights of the parents are guarded in said statute by the requirement that their children shall not be taken from them without a hearing upon due notice in the courts of the State. There is neither denial nor abridgment of constitutional rights.

JUDGMENT.—Impeachment of.—Mental Incapacity of Party.—What Must be Alleged.—One who seeks to impeach a judgment upon the ground of mental incapacity must directly state material facts, showing the existence of such mental incapacity at the date of the rendition of the judgment.

PRACTICE.—Answers to Interrogatories.—When Party May Not Compel.—Where a petitioner has no cause of action he has no right to compel answers to interrogatories.

From the Marion Circuit Court.

J. B. Julian and *J. F. Julian*, for appellants.

C. L. Hare, for appellee.

ELLIOTT, J.—The petitioners in the court below, Georgia Wilkins and John D. Wilkins, are here the appellants. The material allegations of their complaint are these: That the appellant Georgia Wilkins is the mother of Mary Van Walters, William F. Van Walters, and Clara Van Walters; that she married her co-appellant on the 17th day of August, 1891; that the eldest of the three children was born on the 31st day of August, 1879, and the youngest on the 12th day of February, 1887; that on the 11th day of July, 1891, the children, by a decree of court, were committed to the custody of the appellee; that neither of the children was "at any time abandoned, neglected or cruelly treated, nor were they of vicious habits, nor were their surroundings of such a character as to lead to their demoralization;" that the petitioner, Georgia Wilkins, was so distracted in mind, so crazed with grief

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over her children being taken from her, that she was at the time incapable of comprehending or doing anything; "that the petitioners are able and willing to take care of the children, and to make reasonable provision for their physical comfort and welfare, and that they are able and willing to see that the children "go to school and receive a good education." The petition prays that the decree be set aside or that it be so modified as to give them custody of the children for a time specified to enable them to convince the court that they are competent to take care of the children.

It has been for many centuries theoretically true that the State, through its appropriate organs, is the guardian of the children within its borders. The constitution of a State is always presumed to be framed by organized society governed by settled principles. *State, ex rel., v. Noble*, 118 Ind. 350 (361); *Johnston v. State, ex rel.*, 128 Ind. 16 (18), and authorities cited.

It is, therefore, proper to assume that our constitutions, and our laws enacted under it, sanction and confirm the great principle of the sovereign's guardianship of the children within the dominions of the sovereign. But while it is true that this great principle is thus sanctioned and confirmed, it is still true that the equally great principle that natural rights vest in parents the custody and control of their children is confirmed and enforced. This high and strong natural right yields only when the welfare of society or of the children themselves comes into conflict with it; but where there is such conflict the supreme right of guardianship asserts itself for the protection of society and the promotion of the welfare of the wards of the commonwealth. It is unnecessary to define the boundaries or prescribe the limits of the power of the State to take children from the custody of parents who will lead them into evil paths or surround them with vicious influences and place them in the custody of those

In the Matter of Van Walters et al. v. Board of Children's Guardians, etc.

who will train and educate them for good lives and make them useful members of society, for our statute is far within the limits of the great power of inherent State guardianship. The statute, which provides that children may be taken from the custody of parents whose course of life or whose evil conduct unfits them to rear children so that they will become good and useful citizens, was enacted pursuant to the great constitutional provision of which we have spoken, and is not to be broken down by the declaration of a doctrine that will make the duty of those who are selected to take charge of the children so vexatious and difficult that good men and women will be deterred from accepting the office, which, at best, is an unpleasant one. The statute violates no constitutional principle, inasmuch as it guards the interests and rights of parents by requiring that their children shall not be taken from them without a hearing, upon due notice, in the courts of the State. As a check to an abuse of power and the exercise of arbitrary authority by the courts of original jurisdiction, it provides for the right of appeal to the highest court of the State. Here, then, we have a case where the proceedings are founded upon a statute enacted for the purpose of promoting the highest interests of society and in which ample provision is made for a hearing before a court of justice upon due process of law. There is neither denial nor abridgment of constitutional rights, and, hence, no reason why a proceeding conducted in accordance with the provisions of the statute should be excepted from the operation of the general rules of law. What those rules award to the appellants they are entitled to demand, but they are entitled to nothing more.

The fundamental rule is that public officers are presumed to do their duty. This rule intensifies in force when applied to judges, for they hear with deliberation, act with impartiality, and decide upon the law and the evidence. In the law they are learned, and the evidence

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(upon which they act) they derive, under wise rules, from trustworthy sources. If this were a direct attack in the strongest form, it would be our plain duty to presume that the trial court acted upon sufficient evidence, proceeded in regularly, and gave a just judgment. See authorities cited Elliott's Appellate Procedure, sections 709, 710, 712. Under the attack here made we are imperatively required to conclusively presume that there was evidence fully supporting the judgment of the court of original jurisdiction.

Another relevant rule, and an old one, is expressed in the maxim, "A man shall not be twice vexed for one and the same cause." We should violate this rule without justification or excuse if we sustain the assault of the appellants upon the judgment from which this appeal is prosecuted. That judgment has all the attributes of a valid judgment, for there was a hearing in a court of justice, and the hearing was upon due notice. The only allegations that assail the judgment are those which contradict it, and contradiction can not be suffered since judgments import absolute verity. If we should hold that a defeated suitor may deny what a solemn judgment affirms, we should necessarily adjudge that issues may be tried again and again despite a judgment rendered in due course of law by a court possessing plenary jurisdiction; that we can not do, inasmuch as to do it would be to defy authority and disregard principle.

The vague and indefinite allegation concerning the mental condition of the petitioner, Georgia Wilkins, is not sufficient to overthrow a solemn judgment. One who seeks to impeach a judgment upon the ground of mental incapacity must directly state material facts, for mere rhetoric can not supply their place. Here there are general statements showing, if they show anything at all of a substantial nature, mere temporary mental trouble, and that is not enough to overbear a judgment pronounced after a lawful hearing. For anything that appears, the

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mental condition may have lasted but a brief time and not even approached insanity.

Where a petitioner has no cause of action he has no right to compel answers to interrogatories.

Judgment affirmed.

Filed Nov. 15, 1892.

No. 16,029.

FIRST ET AL. v. FIRST ET AL.

DECEDENTS' ESTATES.—Land Held in Trust for First Wife.—Action by Second Wife.—Purchaser for Value.—In an action by the second wife of deceased and his only heir by her against the heirs of the deceased by his first wife concerning a certain tract of land which was claimed by the heirs of the first wife to have been held in trust for their mother, and that it descended wholly to them, the following facts appeared in the evidence: In 1837 the father of E. F., decedent's first wife, left the State of Ohio and entered land in Huntington county. Prior to leaving there was some talk between B. and his daughter and son-in-law about entering a certain tract of land for her, adjoining certain land which her husband expected to enter on his own account. B. entered several tracts of land, and I. F., the husband of E. F., entered and paid for eighty acres with his own money. Another eighty acres was entered, B. furnishing \$100, the amount necessary to make the entry; and the certificate for this entry was in the name of I. F., but was given to B. Afterwards J. F. gave B. a receipt for the \$100. Upon the execution of the certificate for the \$100, the certificate of entry was given to I. F., who obtained title, improved and occupied the land until his death. B. sued I. F. and obtained judgment for the \$100. Proof was made of statements made by I. F. to the effect that the land was bought for his first wife. I. F. executed mortgages on the land to secure the payment of his own obligations. B. stated in the presence of I. F. and his wife, without her objection, that the \$100 was a loan to I. F. There was no evidence of fraud or bad faith on the part of I. F. The court below found against the heirs of the first wife.

Held, that, on the evidence, the judgment of the court below can not be disturbed.

Held, also, that the finding was correct for the reason that J. F., the second wife of I. F., as such was a purchaser for value, and that if there was a trust she had no notice of it.

From the Huntington Circuit Court.

First *et al.* v. First *et al.*

C. W. Watkins, for appellants.

J. C. Branyan and *M. L. Spencer*, for appellees.

MILLER, J.—This is a contest between the appellants, who are the children of Israel First, by his first wife, Eliza Bonewits First, and the appellees, Jane First, his second wife and widow, and David E. First, their only child, over the ownership of eighty acres of land.

The appellants claim that the land was held by Israel First in trust for their mother, Eliza First, the same having been purchased for her, and the title taken in the name of her husband without her knowledge or consent.

The case is before us on the evidence, all other questions being waived.

The evidence tends to show that in the year 1837, Joseph Bonewits, the father of Eliza First, who resided in the State of Ohio, left that State for the purpose of entering land in Huntington county. That prior to leaving home there was some talk between him and his daughter and son-in-law, about entering eighty acres of land for her, adjoining eighty acres which her husband expected to enter on his own account. When they came to the land office at Ft. Wayne, Joseph Bonewits entered several tracts of land. Israel First entered and paid for eighty acres with his own money; another eighty was also entered, Joseph Bonewits furnishing \$100, the amount of money necessary to make the entry. The certificate for this entry was in the name of Israel First, but was given to Bonewits. After their return to Ohio, First gave Bonewits a receipt for the money, reading as follows:

“May 8, 1847. Received of Joseph Bonewits, the sum of 100 dollars, paid on land. ISRAEL FIRST.”

Upon the execution of this receipt the certificate of entry was given to First, who obtained title, improved and occupied the land until his death.

Afterwards Joseph Bonewits sued First for this \$100

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and obtained a judgment, which was reversed in this court and a new trial granted. *First v. Bonewitz*, 3 Ind. 546.

Proof was made of various statements and declarations by Israel First, to the effect that the land was bought for his first wife and would belong to her children. This was met by proof of acts of ownership, such as the execution of mortgages on the land to secure the payment of his own obligations.

There was also evidence introduced strongly tending to show that at the time First received the certificate of entry from Bonewits, and executed the receipt, it was claimed by Bonewits, in the presence of Eliza First, and without objection on her part, that the money paid for the entry was a loan to her husband, and that the receipt was given as the evidence of such loan in her presence.

The witness who testified to the family arrangement in which it was agreed that the land should be entered for Eliza First, admitted that he had testified in the former suit that the receipt was given as evidence of a loan. There was no evidence given of ignorance on the part of Eliza First of the fact that the land had been entered in the name of her husband, and no evidence of fraud or bad faith on his part. Much of the evidence was of a vague and uncertain nature, consisting in the recollections of the witnesses of a transaction occurring when they were of the ages of fourteen and fifteen years, and more than fifty years before the trial.

As the case comes to us we can not say that the trial court was not justified in finding for the appellees.

The finding in favor of the appellee, Jane First, was correct for an additional reason: She was his wife, and as such a purchaser for value, and there is an entire failure to show that she had notice of the trust, if there was one. *Richardson v. Schultz*, 98 Ind. 429.

Judgment affirmed.

Filed Nov. 15, 1892.

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No. 16,002.

**THE CITY OF RUSHVILLE ET AL. v. THE RUSHVILLE
NATURAL GAS COMPANY.**

MUNICIPAL CORPORATION.—Ordinance.—Use of Streets.—Grant to a Particular Company.—License.—An ordinance which specifically and by name grants to a company (in this instance a natural gas company) the right to use its streets, etc., for the purpose of laying its pipes, etc., simply grants a license or permission to the particular company to use the streets for the purpose designated, and does not grant a special and exclusive franchise to the company to occupy and use the streets of the city for said purpose.

SAME.—Ordinance.—Taking Effect in Future.—The fact that part of the provisions of an ordinance was not to take effect until a date designated in the future, would not affect either the validity of the entire ordinance nor of the particular provisions.

SAME.—Natural Gas.—Maximum Rate to be Charged.—City May Prescribe.—Under the act of March 7th, 1887 (Acts 1887, p. 36), municipal corporations have the authority to regulate the supply, distribution and consumption of natural gas, including the fixing of maximum rates to be charged therefor.

SAME.—Act of March 7th, 1887 (Acts 1887, p. 36), Construed.—Scope of.—Title of Act.—If the body of an act is ambiguous or doubtful, reference may be had to its title to aid in ascertaining the legislative intent. A reference to the title of the act above referred to shows that it was the purpose of the Legislature to empower a municipality with authority to do more than merely require the payment of a license fee by persons and corporations to whom it granted the privilege of using its streets and alleys for the distribution of natural gas therein. It was evidently the legislative purpose to confer upon the municipality the power to fix the maximum rate to be charged as a part of its power to regulate the supply, consumption and distribution of natural gas within its limits.

SAME.—Maximum Rates.—Right to Fix by Subsequent Ordinance.—Reserved Power of City.—Where the ordinance under which the plaintiff company was operating contained nothing whatever on the subject of rates, the city had the right to pass a subsequent ordinance fixing maximum rates to be charged consumers, which should apply as well to the plaintiff company as to others. The plaintiff company in accepting its franchise and in entering upon its work without exacting a stipulation reserving to itself the power to fix its own charges or otherwise contracting for a restraint of the powers of the city, acted in full view of the reserved power of the city, under the statute, to establish maximum charges by which it should be governed.

132	575
135	51
132	575
146	660

132	575
155	668
155	669

132	575
e157	166

132	575
e164	165
e164	166

132	575
f169	381

The City of Rushville *et al.* v. The Rushville Natural Gas Company.

SAME.—*Supplying Natural Gas a Public Work.—Delegation of Control Over to City.*—The work of supplying natural gas to cities is a public one, for which property may be appropriated under the right of eminent domain. Property thus employed is devoted to a public use, and is subject to control and regulation by the State, and the State may delegate such control in whole or in part to municipal corporations in so far as relates to property thus devoted to such use within their limits. The right of control thus possessed, and which may be so delegated, includes the power to fix reasonable maximum rates that may be charged by the holder of the franchise, unless the State or the municipality is restrained by some provision in the charter or grant of the license which amounts to a contract.

SAME.—*Furnishing Gas to all Consumers.—Ordinance May Require.*—A provision in an ordinance requiring any corporation, company, firm or individual accepting the provisions of the ordinance, to furnish gas to all consumers along the line of mains whenever applied for, is valid.

SAME.—*Filing of Bond.—Subsequent Ordinance Requiring.—Invalidity of as to Plaintiff Company.*—Where the plaintiff company received its franchise under an ordinance which did not require the filing of a bond on its part, it could not be required to file a bond (the execution of the bond was of itself made a full acceptance of the new ordinance, with all of its requirements) in compliance with a provision to that effect contained in a later ordinance.

SAME.—*Relief by Injunction.*—Where the employees in charge of the work of the plaintiff company were arrested, prosecuted and fined for the refusal of the company to file such bond, and further prosecutions were threatened if the refusal was persisted in, the plaintiff company had the right to go into a court of equity and have the enforcement of the bond provision of the later ordinance against it stayed by injunction.

COFFEY, J., dissents to so much of the opinion as holds that the statute therein set out confers the right to regulate the price at which natural gas shall be furnished.

From the Rush Circuit Court.

A. B. Irwin, for appellants.

G. W. Campbell, B. L. Smith and C. Cambern, for appellee.

MCBRIDE, J.—The appellant, the city of Rushville, by ordinance, granted to the appellee, the Rushville Natural Gas Company, the right to use the streets, alleys and other public grounds of the city for the purpose of laying pipe and doing other necessary work in putting in a natural gas plant

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to supply the inhabitants of the city with natural gas. The appellee accepted the franchise, entered upon the streets, alleys and public grounds of the city, sunk wells, dug trenches, purchased and laid pipes, and entered upon the business of supplying natural gas in accordance with the terms of the ordinance.

The appellee avers that it expended in this way the sum of \$100,000; that it in all respects complied with the requirements of the ordinance in question, and had made contracts with citizens of the place to supply them with natural gas, for which they were to receive \$18,000 per annum.

Afterward the city enacted another ordinance, fixing the conditions under which *any* corporation or person could use the streets, etc., for the introduction and supply of natural gas. The latter ordinance was much more specific in its terms than the other, and imposed additional conditions and restrictions upon those acting under it. It also prescribed penalties for its violation. The appellee insisted that the last ordinance could not be made to apply to it, and refused to accept it or to conform to its requirements, and especially to execute a bond required by its terms, and was, through its employees, proceeding under the old ordinance to lay pipes and furnish gas to its patrons. The employee in charge of its work was arrested, prosecuted and fined for so doing, and the appellee alleges that the officers of the city threatened to continue such prosecutions indefinitely unless they accepted the terms prescribed by the last ordinance.

This suit was brought to enjoin the city from the further enforcement of the new ordinance against the appellee, and the further maintenance of the system of prosecutions which had thus been commenced and were threatened.

The questions presented by the record, upon which the controversy mainly hinges, are these:

1st. Is the original ordinance valid?

2d. Is the new ordinance valid, or, if valid in part, is it

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void in any of its material provisions which the appellant seeks to compel the appellee to accept before allowing it to proceed with its business?

3d. Assuming both ordinances to be valid, did the appellee, by its acceptance of the old ordinance, and its subsequent action thereunder, acquire substantial rights which would be violated by the enforcement of the new ordinance against it?

Incidentally, several other questions arise, which will be noticed hereafter.

The appellant insists that the old ordinance is void, for the reason that it attempts to grant a special and exclusive franchise to the appellee to occupy and use the streets of the city for the purpose of supplying natural gas to the city and its inhabitants. If the fact is as claimed, the appellant is unquestionably right as to the law. It is not in the power of the city to grant an exclusive franchise of that character and give to any person or corporation a monopoly of its streets. *Citizens' Gas, etc., Co. v. Town of Elwood*, 114 Ind. 332; *Crowder v. Town of Sullivan*, 128 Ind. 486. The ordinance here in question, however, is not open to this objection. It does not give, or purport or attempt to give, any exclusive right to the appellee. The only basis for the contention of the appellant is that the ordinance specifically, and by name, grants to the appellee the right to use its streets, etc., for the purpose of laying its pipes, etc. This is a mere license, or permission to this particular company to use the streets for the given purpose. That such a license is not exclusive and does not grant a monopoly is well settled. This question was so fully considered in the recent case of *Crowder v. Town of Sullivan*, *supra*, that it is unnecessary to consider it further. No other objection has been urged to the validity of the ordinance and we know of none. We regard it as valid.

The only objection to the validity of the second, or as it is styled by counsel, the "new" ordinance, as an entirety is, that as to a part of its provisions it does not take effect until

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December 1st, 1892. The case of *Hendrickson v. Hendrickson*, 7 Ind. 13, is cited as sustaining this contention. In that case the question was not as to the validity of a statute but as to when it took effect. The Constitution of the State, section 28, article 4, provides that: "No act shall take effect until the same shall have been published and circulated in the several counties of this State by authority, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law." The Legislature passed an act declaring in the body of the act that it should take effect and be in force from and after August 1st, 1852. There was no emergency declared, and the act was not published and circulated until May 6th, 1853. The court held that the act was not in force until May 6th, 1853. This case does not sustain the contention of the appellee. If the act in question had contained an emergency clause it would undoubtedly have taken effect at the time named in the act. As it was, it took effect and became a valid and effective law when published and circulated as required by the Constitution. The rule relative to municipal ordinances is thus stated by Judge DILLON: "Municipal ordinances, otherwise valid, may, like an act of the Legislature, be adopted to take effect in the future and upon the happening of a contingent event." Dillon Munic. Corp., section 309. See, also, Sutherland Stat. Con. 107, and authorities cited.

The fact that certain provisions of the ordinance are not to take effect until December 1st, 1892, does not affect either the validity of the entire ordinance nor of the particular provisions.

Objection is made to the validity of several specific provisions of the ordinance.

The second section provides that "Before any corporation, firm, individual or company desiring to pipe the city of Rushville for the supply of natural gas shall do any work toward laying any mains or pipes in any street," etc., of the city, they shall execute a bond with sureties in the penal sum of

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\$5,000, conditioned for the performance of certain acts. Section 12 of the ordinance provides that the filing of such bond shall constitute a full and complete acceptance of the provisions and conditions of the ordinance as soon as such bond is approved by the mayor and filed by him in the office of the city clerk. It is insisted by the appellee that it was not in the power of the city to exact the filing of such bond in any case, and especially that as to it the bond could not be required. For reasons which will hereafter appear, we do not deem it necessary to consider the power of a municipal corporation to require, as a condition of granting a franchise of this character, the execution of a bond, with surety, to restore the streets, when pipes are laid, to their original condition, or to maintain them in that condition for any given time, which was the general character of the bond required in this case.

Section 10 prescribes certain maximum rates which may be charged to consumers after December 1st, 1892, and forbids the charging of any higher rates after said time. It is averred in the complaint that the appellee has a large number of contracts with consumers based upon schedules of prices higher than those fixed by the ordinance, the total amounts aggregating \$18,000, said contracts being for the term of three years, and all to take effect in the month of November, 1889. As these contracts will all expire before the schedule of prices fixed by the ordinance will take effect, there is no question of interference with contracts already made between the appellee and consumers.

The appellee, however, denies the power of the city to fix rates at all, and further, that even if such power exists it can not be exercised as against the appellee.

The act of March 7th, 1887, Acts 1887, page 36, Elliott's Supplement, section 800, contains the following: "The boards of trustees of towns, and the common councils of cities in this State, shall have power to provide by ordinance, reasonable regulations for the safe supply, distribution and

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consumption of natural gas within the respective limits of such towns and cities." * * *

The appellant insists that the statute furnishes ample authority to municipalities to regulate the supply, distribution and consumption of natural gas, including the fixing of maximum rates to be charged therefor, while the appellee contends that the only regulations authorized by it are such as conduce to safety; that the corporation can only make regulations providing for its *safe* supply, *safe* distribution and *safe* consumption.

If the appellee is right in its interpretation of this statute, the Legislature by its enactment conferred upon municipal corporations no power whatever except the power to exact a license fee from persons or companies to whom franchises are granted. Independently of any statutory authority, municipal corporations possess, among their implied and inherent police powers, ample authority to impose upon corporations, or natural persons licensed by them to exercise any powers within the corporate limits, all reasonable regulations necessary to provide for the safety of their inhabitants. *First Nat'l Bank v. Sarlls*, 129 Ind. 201; *City of Crawfordsville v. Braden*, 130 Ind. 149; *Clark v. City of South Bend*, 85 Ind. 276.

If the regulations which the statute purports to authorize such corporations to make are limited to such as conduce to the safety of their inhabitants, it is, therefore, as to such matters merely declaratory of such inherent powers and a work of supererogation.

It will never be presumed that the Legislature in the enactment of a given law has done a vain thing, and it is presumed that it intends its acts and every part of them to be valid and capable of being carried into effect. Sutherland Statutory Construction, section 331.

It is presumed also that "the Legislature is acquainted with the law, and that it has a knowledge of the state of it upon

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the subjects upon which it legislates." Sutherland Statutory Construction, section 333.

It must be conceded that the language used in the statute is somewhat ambiguous. In our opinion, however, the construction contended for by the appellee is incorrect, and that the intention of the Legislature was to confer upon the municipal authorities full power to regulate the supply, distribution and consumption of natural gas.

We are aided in reaching this conclusion by referring to the title of the act, which reads as follows: "An act empowering cities and towns within the State of Indiana to regulate the supply, consumption and distribution of natural gas therein, and declaring an emergency." It will be observed that the word "safe" does not occur in the title. It is well settled that if the body of an act is ambiguous or doubtful reference may be had to its title to aid in ascertaining the legislative intent. Sutherland Statutory Construction, sections 210, 211. *Garrigus v. Board, etc.*, 39 Ind. 66; *Smith v. State*, 28 Ind. 321; *United States v. Palmer*, 3 Wheaton, 610; *Burgett v. Burgett*, 1 Ohio, 469.

Sutherland says: "If the meaning is doubtful, the title, if expressive, may have the effect to resolve the doubts by extension of the purview, or by restraining it, or to correct an obvious error; for in ascertaining the intention nothing is to be rejected from which aid can be derived; therefore, the title of an act may claim a degree of notice, and is entitled to its share of consideration." Section 210.

"The title of an act is now so associated with it in the process of legislation that when, in performing its constitutional functions, it affords means of determining the legislative intent, in cases of doubt its help can not be rejected for being extrinsic and extra legislative. The language of an act should be construed in view of its title and its lawful purposes." Section 211.

Assuming appellee's construction to be correct, the title is misleading, and does not express the subject of the act. If

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that construction is correct, the title should read, "An act empowering cities and towns within the State of Indiana to require the payment of a license fee by persons and corporations to whom is granted the privilege of using the streets and alleys of such cities and towns for the distribution of natural gas therein," that being, according to that interpretation, the only power actually conferred by the act. We can not think that it was the purpose of the Legislature to leave municipal corporations absolutely without power of control or regulation over the holders of such franchises except as they may be able to reach and control them in the exercise of their implied police powers. To give to the statute such construction would be to say that after such franchises have been acquired, no matter what conduct their holders may be guilty of tending to the discomfort or inconvenience of the citizen, and no matter how extortionate they may be, unless their acts tend to endanger safety, or otherwise come within the purview of the inherent police powers of the municipality, there is no remedy, as the Legislature has left them independent of municipal supervision.

It may be said that the dangers of an abuse of power are not confined to the one side, and that municipal corporations having, by the granting of franchises not containing any limitation upon the power to charge such rates as they may see fit, induced persons to invest their money in such enterprises, they should not be allowed to afterward dictate the terms upon which, and prices for which, the public shall be served.

There is, of course, in such cases, more or less danger of oppression and injustice. This involves a question of legislative policy with which the courts can not interfere. There is, however, a clear distinction between the two cases. The officers of the municipality represent the public, and are presumably acting for the public good, while the holders of the franchise represent simply their private interests; and while they have devoted their property to public use, they are, presumably, by such use seeking their personal and private gain.

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If there should be, in a given case, a clear case of oppression and abuse of power by the municipal authorities, the courts might afford relief, but it is for the Legislature alone to delegate authority and limit the extent to which regulation shall be carried, subject to the limitation, that under the guise of regulation property may not be confiscated, or its owner deprived of its use without compensation, and without due process of law.

It is too well settled to be longer the subject of controversy, that where the owner of property devotes it to a use in which the public have an interest, he must, to the extent of the interest thus acquired by the public, submit to the control of such property by the public for the common good. *Munn v. Illinois*, 94 U. S. 113; *City of Zanesville v. Zanesville Gas Co.*, 23 N. E. Rep. 55; *Hockett v. State*, 105 Ind. 250.

Indeed, so firmly is this established, and by authorities so numerous, that it is hardly necessary to cite.

The work of supplying natural gas to cities is a public one, for which property may be appropriated under the right of eminent domain. *Kincaid v. Indianapolis, etc., Co.*, 124 Ind. 577, and authorities cited.

Property thus employed is devoted to a public use, and is subject to regulation and control by the State, and the State may delegate such control in whole or in part to municipal corporations in so far as relates to property thus devoted to such use within their limits. The right of control thus possessed, and which may be so delegated, includes the power to fix reasonable maximum rates that may be charged by the holder of the franchise, unless the State or the municipality are restrained by some provision in the charter, or grant of the license, which amounts to a contract. *Munn v. Illinois, supra*; *Peik v. Chicago, etc., R. W. Co.*, 94 U. S. 164.

The delegation of power by the Legislature in this case, covering as it does the entire ground of the supply, distribution and consumption of natural gas, in our opinion car-

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ries with it and includes the power to exercise a reasonable control over the price which may be charged to consumers. The old ordinance contained nothing whatever on the subject of rates, and we see no reason why the city should be restrained from the enactment and enforcement against appellee as well as all others of reasonable regulations fixing maximum rates which might be charged consumers. The Supreme Court of Ohio, in the recent case of *City of Zanesville v. Zanesville Gas Light Co.*, 23 N. E. R. 55, applied the principle of *Munn v. Illinois*, *supra*, to the case of a company engaged in manufacturing and supplying artificial gas to the inhabitants of the city of Zanesville. The court says: "Because, prior to any legislation on the subject, it may have possessed the common law right of fixing its own prices, it does not place it beyond the reach of any legislative control on the subject, whenever, in the interest of the public good, it becomes necessary that such control should be had."

The appellee in accepting its franchise, and in entering upon its work without exacting a stipulation reserving to itself the power to fix its own charges, or otherwise contracting for a restraint of the powers of the city, acted in full view of the reserved power of the city, under the statute, to regulate and establish maximum charges by which it should be governed.

We think that provision in the ordinance is valid and binding upon the appellee.

Section 11 of the new ordinance is as follows: "Any corporation, company, firm or individual accepting the provisions of this ordinance, shall be compelled to furnish gas to all consumers along his or their line of mains whenever applied for."

This the appellee insists is invalid, and that such compulsory service can not be exacted. There is some conflict in the courts over this question, but that which we regard as the true rule is laid down in the case of *Williams v. Mutual Gas*

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Co., 52 Mich. 499 (50 Am. Rep. 266), where it is held that a gas company is bound to supply all individuals along its lines requiring it, on payment or reasonable security. In that case there does not seem to have been any ordinance requiring compulsory service, but the gas company refused on demand to furnish gas to a would-be consumer unless he would first deposit with them \$100. On the hearing the company contended that it was under no legal duty or obligation to supply any citizen of Detroit with gas. The court said: "The defendant is a corporation, in the enjoyment of certain rights and privileges under the statutes of the State, and charter and by-laws of the city, and derived therefrom. These rights and privileges were granted that corresponding duties and benefits might enure to the citizens when the rights and privileges conferred should be exercised. The benefits are the compensation for the rights conferred and privileges granted, and are more in the nature of convenience than necessity, and the duty of this corporation imposed can not therefore be well likened to that of the inn-keeper or common carrier, but more nearly approximates that of the telegraph, telephone or mill-owner." See *Telephone Co. v. Bradbury*, 106 Ind. 1; *Central Union Tel. Co. v. State*, 118 Ind. 194.

We regard the section in question as valid, and within the power of the city to impose upon the appellee.

The ordinance is long, and contains many provisions, the validity of which have not been questioned in argument or considered by us. This opinion can not of course be considered as an adjudication of the validity of any of its provisions not discussed and passed upon herein.

Reference has heretofore been made to the bond required by section 2 of the ordinance. The section is long and sets out at length the several conditions of the required bond. No good purpose would be subserved by adding to the length of this opinion by copying, or even abstracting them. It is sufficient to say that many and onerous duties are im-

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posed upon the obligors. No similar bond was required by the old ordinance, but by the terms of the new ordinance the appellee is denied the right of carrying on the work of laying pipe, making connections with mains, or otherwise discharging its obligations to its patrons, without first executing the bond. The execution of the bond is also made of itself a full acceptance of the new ordinance with all of its requirements. Whatever the right or the power of the city may be to exact the execution of such a bond as a condition of the granting of a franchise of this character (about which we express no opinion), it is clear that it was not in its power to exact it of the appellee after it had accepted and acted under the provisions of the old ordinance. Section 2 of the new ordinance is, therefore, inoperative in so far as the appellee is concerned.

The prosecutions complained of grow out of the refusal of the appellee to comply with that section by executing the bond and thus signify its acceptance of that ordinance, and should not have been commenced or maintained.

The appellant contends, however, that even if this is true the appellee was not entitled to relief by injunction. This question has been decided adversely to the appellant in the recent case of *Davis v. Fasig*, 128 Ind. 271.

It was there held, following numerous authorities, that a court of equity may enjoin the enforcement of a city ordinance to prevent a multiplicity of actions, the ordinance being void as to the appellees in a most material provision, which absolutely denied to it substantial rights except on condition that it submit to unjust restrictions, it had the right to go into a court of equity and have its enforcement stayed by injunction. We find no error in the record, and the judgment is affirmed.

MILLER, J., took no part in the decision of this case.

Filed Oct. 31, 1891; petition for a rehearing overruled April 23, 1892.

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DISSENTING OPINION.

COFFEY, C. J.—I regret my inability to concur with my brethren in so much of the opinion in this case as holds that the statute therein set out confers the right to regulate the price at which natural gas shall be furnished.

This statute confers upon the boards of trustees of towns and the common councils of cities the power to regulate the safe supply, the safe distribution, and safe consumption of natural gas, but this does not, in my opinion, include the right to regulate the price at which it shall be sold.

Filed Oct. 31, 1891.

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No. 15,918.

HILL ET AL. v. POLLARD.

JUDGMENT.—*Complaint.*—*Defective Paragraph.*—*Overruling Demurrer to.*—*When not Available Error.*—Where a demurrer should have been sustained to a paragraph of complaint, there is no available error, if it is apparent from the record that the judgment rests upon a good paragraph or paragraphs of the complaint, for the court can see from the record that no harm was done the complaining party.

TRUSTS AND TRUSTEE.—*Real Estate.*—*Agreement to Furnish Money and Take Title in Name of Another.*—A. and B. agreed to purchase a certain tract of land for \$5,700; A. was to furnish \$2,500 to make the first cash payment, and B. was to assume the payment of the remainder, \$3,200. It was agreed between A. and B., and assented to by C., the wife of B., that the title should be taken in the name of C., and should be held by her in trust for A. and B. A. turned over to B. United States bonds to the amount of \$2,350 to be applied in payment on the land, and was to furnish the other \$150 to B. in a short time, which he accordingly did. B. was entrusted to make the purchase, and the vendor not wishing to accept the bonds as part payment, B. obtained the money from C., his wife, and made the payment. Three days afterwards B. sold the bonds as the property of C. for \$2,360, and \$1,000 was paid in cash to B. as agent of C., and \$1,360 was deposited to the credit of C.

Held, that the facts are such as to justify the trial court in finding and decreeing that C. held the land in trust, and that A. held an interest in

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the land in proportion to the amount of his payment to the whole amount paid.

From the Decatur Circuit Court.

J. K. Ewing and *C. Ewing*, for appellants.

S. A. Bonner, *M. D. Tackett*, *B. F. Bennett* and *D. Wilson*, for appellee.

OLDS, J.—This suit was brought by the appellee against the appellants, Edith A. Hill, Elmer Hill and Lewis Wiley, to have a trust declared, and for partition or sale of the real estate in which he claimed an interest. The complaint originally consisted of six paragraphs, but all were dismissed except the first and second. A demurrer was filed as to the first and second paragraphs and overruled and exceptions reserved, and the appellants answered by general denial. The cause was submitted to the court, and on proper request the court made a special finding of facts and stated its conclusions and rendered judgment in favor of the appellee for ~~3488~~ of said real estate. Appellants Hill and Hill excepted to the conclusions of law, also filed a motion for new trial, which was overruled and exceptions reserved, and errors are assigned on these rulings. The two paragraphs of the complaint are substantially the same except in one particular. They allege that appellee and appellant Elmer Hill contracted and agreed that a certain tract of land in Decatur county, Indiana, describing it, should be purchased from one Joshua Christy; that the same should be purchased for \$5,700; that of said sum appellee should furnish \$2,500; that appellant Elmer Hill should pay as his part of the purchase price of said land the balance of the purchase price for said land; that Elmer Hill was not to pay his share of said purchase money in cash, but that he expressly agreed with said appellee that in consideration of his, said Pollard's, payment of said sum of \$2,500 said Hill would assume the payment of two debts secured by a mortgage on said land, one for \$700 to and in favor of one William S. Woodfill,

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and one for \$2,500 to and in favor of one Jesse Doyle, and by him assigned to one Wiley, who was made a defendant. The mortgages and assignments were made a part of the complaint as exhibits; that the amounts of money so to be advanced by said appellee and said Elmer Hill by the payments as set out in the paragraph was to constitute and determine their respective interests in said land.

It is also alleged that it was further agreed between said appellee and said Elmer Hill that said conveyance should be made by said Christy and his wife Martha to appellant Edith A. Hill, wife of said Elmer Hill, and that she should hold the legal title to said land, but that she should hold the same in trust for the benefit of said appellee, and said Elmer Hill, in accordance with and in pursuance of the aforesaid agreement between said appellee and appellant Elmer Hill; that in pursuance of the aforesaid contract said appellee did furnish the sum of \$2,500 to said appellant Elmer Hill, with the express understanding and agreement that the same should be paid to said Joshua Christy as a part payment of said purchase price of said real estate; that in further pursuance of said contract said conveyance by said Christy and wife was made by deed, a copy of which is filed with and made a part of the complaint by exhibit to said appellant Edith Hill; that no part of said purchase money was paid by said Edith Hill; that said Elmer Hill has wholly failed to pay said Wiley any part of the mortgage debt due him, or any interest on the same, but that he has paid the Wood-fill debt.

It is further averred that it was expressly understood and agreed between appellee and appellant Elmer Hill that said Edith was to accept said conveyance and to hold the same in trust to carry out the provisions of said contract as to the respective interests of said parties, and to account to the appellee for his share of the rents and profits in said land as his interest in said land entitled him to; that it was further agreed that if appellee became dissatisfied and desired

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the land to be sold and his interest paid to him, the land should be sold and appellee's interest paid to him.

It is further averred that appellant Edith Hill accepted said conveyance with full knowledge of the facts and circumstances and contract aforesaid between appellee and her husband, she having the knowledge at and before the time she accepted the conveyance; that appellee is and for a long time has been dissatisfied and desirous to have the land sold, and the trust terminated, and the appellants, Hill and Hill, and each of them, fail and refuse to acknowledge the interest of appellee in the land, that said appellant Edith Hill holds the same and denies the interest of the appellee in the land.

The second paragraph expressly avers that the deed was so taken in the name of said Edith Hill in accordance with the agreement and without any fraudulent intent. The first paragraph does not contain any averment that the deed was so taken without any fraudulent intent, though the pleading shows by its averments that the deed was made in pursuance of a purchase for full consideration paid and to be paid, and the deed taken in the name of Edith Hill by mutual agreement of the parties paying the purchase-money and with her knowledge of and assent to such contract.

It is urged that the first paragraph is bad for the reason that it contains no averment to the effect that the transaction was a good faith transaction, made without any fraudulent intent. It is unnecessary to consider this question any further than to say that the second paragraph does contain such an averment, and the court, by its 14th finding of fact, finds "that the arrangement for the purchase of said farm and the placing of the title thereof in said Edith A. Hill was made in good faith and without any intention on the part of plaintiff in this cause to defraud his creditors."

From this finding it is clearly apparent that the appellants were not harmed by the ruling on the demurrer in overruling of the demurrer to the first paragraph, and that the

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finding and judgment rests on the second paragraph. The material fact omitted from the first paragraph was considered, tried and determined, and the court made a special finding of the material fact alleged to be omitted in the first paragraph. The rule governing in such cases is well and clearly stated in Elliott's Appellate Procedure, section 666, and the authorities collected supporting the rule. In that section it is said: "If the record proper clearly shows that the judgment rests on the good paragraph or paragraphs, there is no available error, since the court can see from an inspection of the record that no harm was done the complaining party."

In this case it plainly appears that the omitted fact was determined and a finding of the fact by the court in its special finding of facts, and no harm was done the complaining party by the ruling, and, therefore, the court will not reverse the judgment on account of such error, it being harmless.

The next question presented arises on the overruling of the motion for a new trial, questioning the correctness of the facts as found by the court. We have examined the evidence and think it fairly supports the findings. True, there is a conflict in the evidence, but the weight to be given to the various items of evidence, or statements of witnesses, must be determined by the trial court.

It can hardly be seriously contended but that the appellee gave to the appellant Elmer Hill, prior to the execution of the deed, two United States Government bonds, amounting to and of the value of \$2,350, in pursuance of their agreement, to be used by Hill to make the cash payment on the land, but it is contended on behalf of counsel for the appellant that neither the bonds nor the money received from the bonds were used in making such cash payment, but on the contrary the vendor refused to accept the bonds, preferring the money, and that Mrs. Hill furnished the money and made the payment, and some few days thereafter her

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husband had the bonds cashed and converted the money received thereon to his own use, at least it is not claimed that he ever refunded the money to appellee.

There is some evidence tending to show, and from which the court may have found that there was an agreement made between appellee and appellant Elmer Hill to purchase the land, appellee furnishing the money for the cash payment, and to put the title in the name of Mrs. Hill, and this was talked over in the presence of and assented to by Mrs. Hill. The deed was executed and the cash payment made on the 13th day of March, 1886, and it appears by the testimony of the cashier of the Citizens' National Bank, that, on the 16th day of the same month, the bonds were sold to that bank for \$2,360; that they were coupon bonds; that they were sold in the name of Edith A. Hill, and \$1,360 of the amount deposited to her credit and \$1,000 drawn in cash.

There is evidence, we think, from which the court may have found, as it did in fact find, that the agreement in relation to the farm was made between appellee and Elmer Hill; that the title to the land was to be taken in the name of Mrs. Hill, and that Mrs. Hill agreed to it; that appellee turned over the bonds, amounting to \$2,350, to appellant Elmer Hill, he agreeing to furnish the remainder of the \$2,500, being \$150 for appellee, who was to repay it soon thereafter; that Hill made the purchase, and the grantor not desiring to accept the bonds as cash, thereupon Hill treated the bonds as his own, procured the money, \$2,500, temporarily of Mrs. Hill, paid it over in lieu of the bonds, and held the bonds as the property of Mrs. Hill for the repayment of the money she had advanced in lieu of them, and three days later had them cashed as her property, and received \$1,000 as her agent, and had the remainder deposited to her credit, and some time afterwards appellee paid to Hill the \$150 advanced for appellee in making the cash payment.

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This view of the evidence carries out the agreement honestly as made, and creates a trust in favor of appellee in the land as clearly and effectually as if the bonds had been delivered to the purchaser in payment of the land, and goes upon the presumption that the parties were acting honestly in the transaction. Suppose, instead of delivering to Hill the bonds, the appellee had given to him his check on the bank, payable to bearer, to be delivered to the purchaser. Instead of delivering the check Hill had paid the purchaser the money, and without appellee's knowledge he had retained the check as his own and procured it cashed, and kept the money, can it be said in justice and fair dealing that appellee's money did not go into the land? We think not. Or, suppose, without appellee's knowledge, before he paid the purchaser, he had drawn the money and deposited it in his general account in the bank, and then drew his own check on the bank in favor of the purchaser, and the purchaser had drawn the money on the check of Hill. In such a case we certainly think a court of equity ought not to hold that appellee's money did not go to pay for the land.

In case the check had been retained and the money paid, and afterwards the money drawn upon the check, it would be but a cashing of the check or advancing of the money upon it for the drawer, and in the case at bar it was a cashing of the bonds or advancing money upon them and afterwards disposing of them and retaining the money received in payment of the amount advanced. To hold to any other theory would be to hold that the parties, Hill and his wife, resorted to a trick in the absence of the appellee, obtaining his bonds to be used as a cash payment on the land in which he was to have an interest, and thus without his knowledge by practicing a fraud upon him and paying for the land out of other money and keeping the bonds, converting them to their own use and for the purpose of and with the fraudulent intent of depriving the appellee of any interest in the land. From the testimony of Mr. Christy, the grantor, it

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appears that the appellee and the appellant Elmer Hill came to see him at his farm the day before the deal was made; that the next day he went to town and made the sale, transacting the business with Mr. Hill; that he declined to accept the bonds in payment, and he went to the house and upon request Mrs. Hill handed her husband the money and he paid it over to the grantor, and that afterwards in speaking of the transaction Hill said that he had sold some bonds of Mr. Pollard. The trial court must draw conclusions from what transpired and find the facts, and if there is evidence to support the conclusions drawn and facts found, this court will not disturb the finding. Equity regards that done which ought to have been done. If after obtaining the bonds Hill retained the bonds and furnished money in lieu of the bonds to pay the purchase-money, equity will treat the money as being substituted for the bonds and as being the money of the appellee when it was passed over to the grantor. We think the court drew the correct conclusions from the evidence.

It is contended further that the \$150 paid afterwards did not go into this land so as to give the appellee an interest to that extent. We think it did. The transaction was agreed to between the parties, and appellee was to pay \$2,500 as the cash payment in purchase of the land, and Elmer Hill was intrusted with the transaction of the business, and the balance of the \$2,500 was paid to Hill in accordance with the agreement and received by him. The finding and judgment in favor of the appellee for ~~2500~~ of the real estate was correct. See *Hughes v. State*, 117 Ind. 470; Ballard's Real Estate Statutes, sections 340, 341, and authorities cited.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Nov. 22, 1892.

Chandler et al. v. Beal et al.

No. 15,987.

CHANDLER ET AL. v. BEAL ET AL.

EVIDENCE.—*Report of Drainage Commissioners not Competent.*—*Error.*—Reports of drainage commissioners are not competent evidence on an appeal from such assessments, and when proper objections are made and exceptions are taken, the admission of such evidence will constitute reversible error.

SAME.—*Location of Ditch.*—*In Discretion of Commissioners.*—*Can not Review in Absence of Fraud.*—The location of a ditch upon the best, cheapest and most available route is a matter left to the judgment of the commissioners, which, in the absence of fraud, is not subject to review by the court, and evidence to that effect should be excluded.

SAME.—*Exclusion of.*—*Immateriality.*—It was not error to refuse to allow the remonstrators to ask a witness on cross-examination if he did not go with the commissioners and direct them where to locate the ditch, as such evidence was immaterial.

COSTS.—*Uncalled Witnesses.*—*Manner of Taxing.*—*Discretionary with Court.*—The matter of taxing the costs of witnesses who were subpoenaed and were not called to testify on the trial, is a question largely in the discretion of the trial court.

From the Fulton Circuit Court.

M. R. Smith and *D. C. Justice*, for appellants.

G. W. Holman and *R. C. Stephenson*, for appellees.

MILLER, J.—This case is in this court a second time. *Bell v. Cox*, 122 Ind. 153.

After its return to the circuit court a trial was had upon the issue joined upon the petition and remonstrance, which resulted in the approval of the report of the drainage commissioners, and an order for the construction of the ditch.

The first question discussed in the briefs of counsel relates to the ruling of the court in permitting the petition and report of the commissioners to be introduced and read in evidence.

It is now well settled that the reports of drainage commissioners are not competent evidence on an appeal from

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such assessments, and that when proper objections are made and exceptions taken the admission of such evidence will constitute reversible error. *Corey v. Swagger*, 74 Ind. 211; *Beck v. Pavey*, 69 Ind. 304; *Turley v. Oldham*, 68 Ind. 114; *McKinsey v. Bowman*, 58 Ind. 88; *Coyner v. Boyd*, 55 Ind. 166; *Freck v. Christian*, 55 Ind. 320.

Objections to the introduction of evidence must be made at the time it is offered, and the grounds of the objection stated with such reasonable certainty as to call the mind of the court to the rule or rules of law making it incompetent. Objections not stated to the court below will not be considered by this court on appeal. *Lake Erie, etc., R. W. Co. v. Parker*, 94 Ind. 91; *Binford v. Young*, 115 Ind. 174; *Elliott's App. Procedure*, section 779.

Where specific grounds of objection are stated, the implication is that there are no others, or, if others, that they are waived. *Elliott's App. Procedure*, section 775.

The objections to the admission of the evidence complained of are stated in the record as follows:

"Remonstrators then and there objected to the introduction of the report of the commissioners of drainage, but the court overruled the objection, and to this ruling the remonstrators then and there objected. Their objection was based on the ground that E. J. Deep, one of the commissioners, was not regularly appointed; they also objected to the report of the commissioners of drainage on the ground that it does not show that the proposed ditch will be sufficient to carry off all the water, and that one interested person, Zephaniah Beall, was a chainman, assisting the commissioners in locating the ditch; they also objected to the report on the grounds that after the viewers made their report showing they assessed land in "Union" township, it was inserted "Rochester" township, without the assembling of the commissioners to amend their report themselves.

"The court overruled the objections of the remonstra-

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tors to the report, and to this ruling the remonstrators then and there excepted."

This objection not only did not specifically point out the grounds of objection urged to it in this court, but was well calculated to divert the attention of the court away from the record and authorities making the evidence incompetent.

The appellants offered to prove by a number of witnesses that the route selected for the proposed ditch was not the most practicable, but that another route would accomplish the purpose of drainage better, cheaper and be more practicable; that the ditch as located would not drain appellants' lands, but would injure them. The court rejected the proffered proof, and proper objections and exceptions were made. The statements contained in the offer to the effect that the ditch would not drain the appellants' lands were merely incidental to the proposition that another and different route should have been selected.

The court did not err in refusing this evidence. The location of the ditch upon the best, cheapest and most available route was a matter left to the judgment of the commissioners, which, in the absence of fraud, was not subject to review by the court. *Anderson v. Baker*, 98 Ind. 587; *Heick v. Voight*, 110 Ind. 279; *Meranda v. Spurlin*, 100 Ind. 390.

It was not error to refuse to allow the remonstrators to ask a witness on cross-examination if he did not go with the commissioners and direct them where to locate the ditch. We find nothing in the original examination of the witness to make such cross-examination pertinent. Nor does it appear to be at all material whether he did, or did not, render such assistance to the commissioners.

The court overruled a motion to tax the fees and mileage of certain witnesses to the appellees, for the reason that they had been subpoenaed by the appellees and not called to testify on the trial.

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We can not say that the court erred in overruling this motion. It may have been that the course of the appellees in having the witnesses present to testify was the mere exercise of common prudence to meet anticipated evidence of the appellant. It may have been that the conduct of the appellant was such as to cause the appellees to believe that their presence in court was necessary. Such matters are necessarily left much to the discretion of the trial court. *Ohio, etc., R. W. Co. v. Trapp*, 4 App. 69; *Alexander v. Harrison*, 2 Ind. App. 47.

Judgment affirmed.

Filed Nov. 18, 1892

No. 15,590.

BLACK v. PLUNKETT ET AL.

From the Montgomery Circuit Court.

T. F. Davidson and *J. West*, for appellant.

B. Crane and *A. B. Anderson*, for appellee.

OLDS, J.—This case is in this court for the second time. The former decision is *Plunkett v. Black*, 117 Ind. 14. The judgment being reversed, it was certified back to the Montgomery Circuit Court, and the demurrer sustained to the complaint, and two amended paragraphs of complaint filed, to each of which a demurrer was filed and sustained, and exceptions reserved, and judgment on demurrer in favor of the defendant. Afterwards the appellant filed his complaint to review the judgment, to which a demurrer was sustained and exceptions reserved, and this appeal prosecuted. The facts substantially appear in the former opinion of *Plunkett v. Black*, *supra*, the only difference being that appellant pleaded the facts a little more fully in relation to the contract. It appears that the judgment in the Parke Circuit Court is in full force, and that an execution was issued thereon to the sheriff of Montgomery county. It appears from the averments of the complaint that there was an agreement entered into by which the judgment plaintiff, for a consideration, was to allow the judgment to be set aside and permit a judgment to go in favor of the judgment defendant, the plaintiff herein, but the contract was never carried out and executed. Under the authority of the former decision, *Plunkett v. Black*, *supra*, the Montgomery Circuit Court had no jurisdiction, and the judgment must be affirmed. It is suggested that it is shown that the appellant owns land in Montgomery county, and the writ casts a cloud upon his title, and that such fact gives the Montgomery Circuit Court jurisdiction to remove the cloud and to quiet appellant's title, but this is not a suit to quiet title.

Judgment affirmed, with costs.

Filed June 15, 1892.

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Martin v. The State, *ex rel.*

No. 15,171.

THE BALTIMORE AND OHIO AND CHICAGO RAILROAD COMPANY v. SMITH, TREASURER, ETC.

From the Lake Circuit Court.

H. Newbegin, for appellant.

R. C. Bell and *S. R. Morris*, for appellee.

OLDS, J.—This action is by the appellant against the appellee to enjoin the collection of a tax placed upon the duplicate of Lake county on the property of appellant in Hobart township, as its *pro rata* share of an appropriation of \$10,000 aid voted by the qualified voters of said township to the New York and Chicago Railway Company, or its successors by consolidation, to construct a railroad through said township. The same facts are pleaded both in the complaint and answer, and the same questions are raised, and the same agreement made as in the case of *Lake Shore, etc., R. W. Co. v. Smith*, *ante*, p. 512.

Both cases having been fully briefed, raising the identical questions, and having been passed upon in the other case, we affirm this judgment on the decision in that case.

Judgment affirmed, with costs.

MCBRIDE, J., dissents.

Filed May 11, 1892; petition for a rehearing overruled June 14, 1892.

15950. **EWING v. JUSTICE.** 15951. **EWING v. FERNALD.**

From the Cass Circuit Court.

F. Ullman, *J. C. Nelson* and *Q. A. Myers*, for appellant.

BY THE COURT.—The material questions in the cases above named are the same as those in *Ewing v. Wilson*, *ante*, p. 223, and the judgments are affirmed upon the authority of the decision in that case.

Filed April 27, 1892.

No. 16,409.

MARTIN v. THE STATE, EX REL.

From the Blackford Circuit Court.

R. S. Gregory and *A. C. Silverburg*, for appellant.

ELLIOTT, C. J.—Affirmed upon the authority of *Lugadder v. State, etc.*, 181 Ind. 598.

Filed June 11, 1892.

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Hecht v. Ohio, etc., R. W. Co., 507
2. *Same.*—In the action brought after the death of the injured party, the parties are the same as in the action instituted in his lifetime, except that the injured party is represented by his personal representatives. The cause of action is the same, and while in minor particulars the measure of damages differs, this does not cause the action to survive. Although some items of evidence may be competent or even necessary in one case that are not in the other, and the method of proof may differ, still the action in either case is based on the negligence of the defendant in causing the same and identical injury, and the damages sustained in either case grow out of the injury caused by such negligence.
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Held, also, that when the Attorney General moved to dismiss the appeal on the ground that the suit was fictitious and collusive, and all the parties to the original litigation file affidavits and answers denying collusion, and asserting that the controversy is real, and there is nothing in the record or in the showing made by the Attorney General sufficient to authorize a dismissal, the motion could not be entertained.

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was at the time incapable of comprehending or doing anything; and that the petitioners were able and willing to take care of the children, and to make reasonable provision for their physical comfort and welfare and to give them a good education. A judgment that has all the attributes of a valid judgment imports absolute verity, and can not be successfully avoided by allegations which simply contradict it. Under such an attack it must be conclusively presumed that there was evidence fully justifying the judgment of the court of original jurisdiction.
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Hatfield v. Huntington City, etc., Ass'n, 149

2. *Same.—Section 854, Elliott's Supp. Construed.*—In such an action it was not necessary to allege that the plaintiff had filed the written acceptance provided for by section 854, Elliott's Supp. It was not the intention of the Legislature by the passage of the act of which said section is a part to deprive existing building and loan associations of any of the rights they possessed under the laws in existence. The purpose of the act was to enlarge rather than to restrict their powers. *Ib.*

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by the appellee while in possession of the land the appellant can not complain of the action of the court in overruling a demurrer to a counter-claim filed by the appellee, the court having found against the appellant in his action to recover the land or redeem it from sale, and in favor of the appellee upon the issues joined involving its ownership. *Ball v. Ball, 156*

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4. *Same.—Complaint.—Averment as to Payment of Excess.*—Where, in an action to recover excess of freight, the complaint charged that the excess so charged and received by the defendant was \$2,800, but it did not appear by affirmative allegation that it was paid by the plaintiffs, the inference will be indulged that it was, as they were the shippers, and the complaint will be good as against a demurrer. *Ib.*
5. *Same.—Unjust Discrimination Against Shipper.—Instruction to Jury.*—In such an action, where the evidence showed that for some years prior to the 1st of January, 1887, the plaintiffs and several other parties had been engaged in the business of purchasing and shipping railroad ties over the defendant's road from the stations named in the complaint to the city of Evansville, and that prior to that date a uniform rate of freight per car load of two hundred ties was charged, and that after that date the defendant raised the freight rate ten dollars per car on all shippers except one D., an instruction was proper which informed the jury that if during several months of the year 1887 the plaintiffs shipped a large number of cross-ties in the usual manner over the defendant's road, and during the same time D. shipped a greater number of car-loads under special contract, which, in addition to the contract of assignment contained other stipulations of advantage to the defendant, the natural and necessary effect of the transaction, considered in detail and altogether, was a substantial discrimination in favor of D. against the plaintiffs, whereby the plaintiffs were made to pay the defendant many hundred dollars in excess of that paid by D. for similar services, and in excess of the value of all that was done or furnished or to be done or furnished by him under the special contract, and the plaintiffs, upon making a demand would be entitled to recover for the excess of freight so paid by them. *Ib.*
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with the plaintiff. The mortgage was foreclosed. The bondholders became the purchasers at the foreclosure sale and reorganized the company.

Held, that the new company, although it used the station, was not liable to the plaintiff.

Held, also, that an agreement between the bondholders that a certain sum should be retained for the payment of a specified claim and other small claims, as might be required, the claim of the plaintiff not being specially designated, created no obligation in his favor.

Held, also, that even if an obligation was created in favor of the plaintiff, he would have no right to recover upon it, as it does not appear that the sum was not properly used to pay the claim specified or other claims having rightful precedence of the plaintiff's claim.

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4. *Same.—Instructions to Jury.—Rape.—Nature and Extent of Resistance.*—An instruction to the jury in a prosecution for rape is proper which informs them that the nature and extent of resistance which ought reasonably to be expected in each particular case must necessarily depend upon the particular circumstances of the case, and that no general rule can be laid down upon the subject.
Ib.
5. *Same.—Instruction to Jury.—Reasonable Doubt.*—In the absence of any instruction defining a reasonable doubt, and in a case where the verdict is not so clearly right that an erroneous instruction can be disregarded, a judgment of conviction will not be upheld where the whole tenor of the special instruction upon the subject of reasonable doubt was to constantly admonish the jury against entertaining unreasonable doubts, while there was no corresponding admonition against convicting the defendant if a reasonable doubt of his guilt should exist. For instruction, see opinion.
Ib.
6. *Assault and Battery with Intent.—Proof of Specific Acts of Violence by Injured Party.*—In a prosecution for assault and battery with felonious intent, it was not error for the court to refuse to permit the defendant to prove that eight or nine years prior to the commission of the offence for which he was indicted, the injured party used a knife upon the victim, and that knowledge of this fact was brought to the defendant prior to the difficulty for which he was on trial. The evidence offered was inadmissible because proof of commission of specific acts of violence by the injured party prior to the difficulty could not be introduced in evidence. And in addition to this it was inadmissible on account of the remoteness in time.
Smith v. State, 145
7. *Seduction.—Evidence.—Sufficiency of to Warrant a Conviction.*—In a criminal action for seduction, the only evidence introduced to corroborate the testimony of the prosecutrix was the testimony given by Charles Simon, of a conversation with the appellant, in which the appellant said: "That Ella was a good girl, and he expected to make her Mrs. La Rosae."

Held, that the evidence of the prosecutrix was not sufficiently corroborated to authorize a conviction under section 1807, R. S. 1881.

La Rosae v. State, 219

8. *Alibi.—Instruction.—Reasonable Doubt of Accused's Presence at Place of Crime at a Particular Time.*—In a prosecution for larceny, where the prosecuting witness has testified that the property was stolen on a certain night, it is not error to refuse an instruction to the effect that if the jury have a reasonable doubt, from the evidence, whether or not the accused was at the place of the crime on such night they must acquit.
Conrad v. State, 264
9. *Same.—Defining Alibi.*—It is not error to refuse to give the jury a definition of "alibi."
Ib.
10. *Same.—Jury Considering, Instructions.—Other Crimes.*—In determining a defendant's guilt or innocence, the jury can not consider the commission of other crimes by him; but it is not error to refuse to instruct the jury that they should not consider any act of the accused, which he has testified to, and which they believe to be wrong.
Ib.
11. *Same.—Reputation of Accused for Veracity.—Neighborhood Reports.*—If a man's neighbors generally say nothing about his truthfulness, that fact of itself may be evidence that his general reputation for truth is good; and whether or not he has such a reputation is a question for the jury.
Ib.
12. *Trial by Less than Twelve Jurors.—Affidavit.—Bill of Exceptions.*—In a prosecution for a criminal offence, where it was alleged as a ground for a new trial that during the progress of the cause two of the twelve jurors selected by the parties were discharged by the court by reason of illness, and that the verdict was rendered by the remaining ten jurors, and there was what purported to be an affidavit in support of the charge, but no reference was made to the same in the motion for a new trial, and it was not embraced in the bill of exceptions, the question is not properly presented on appeal *Townsend v. State, 316*
13. *Prosecution for Murder.—Administration of Poison.—Declarations of Deceased.—Res Gestæ.*—Where the defendant was indicted for murder, for administering poison in liquor to the deceased, it was proper on the trial of the charge to admit in evidence complaints of the deceased made shortly after taking the liquor that it was bitter, and accusing the defendant of having put quinine in it, the complaints having been made while the defendant was within hearing, and there being evidence that he heard the same, although he denied hearing them.
Hall v. State, 317
14. *Same.—Declarations of Deceased After Occurrence.—Inadmissibility of.*—Declarations made by the deceased to his wife, in the absence of the appellant and some time after the occurrence, to the effect that the appellant had invited him to take a drink of blackberry wine, and that it was very bitter, etc., were not admissible in evidence. They were so separated from the act as to be merely narrative of what had occurred, and did not constitute a part of the *res gestæ*.
Ib.
15. *Same.—Dying Declarations.*—Such declarations or facts stated by the deceased, which he would be permitted to testify to if a witness, are admissible as dying declarations, the conditions existing which permitted of the introduction of his dying declarations in evidence.
Ib.
16. *Same.—Reputation of Defendant for Peace and Quietude.—Use of Word "Inoffensive."*—Evidence of the general reputation of the accused for peace and quietude is admissible in a prosecution for murder, though the murder may have been committed by poisoning. The use of the word "inoffensive" as well as the words "peace" and "quietude" in interrogating the witness was not objectionable.
Ib.

17. *Same.—Evidence.*—It was not error to refuse to permit the defendant to prove that he had drank liquor with the deceased out of a bottle marked "poison," taken from the barn, and that the deceased said at the time that he marked the bottle and put whisky in it, and put it in the barn in order that his hired men would not know where it was, and in order that the women folks would not "catch on" to it, and to prove that he had other bottles at the same place, it not appearing when this occurred nor that at the time of the taking of the drink and death of the deceased he kept bottles in such manner at the barn, and from which he might have drank by mistake. *Ib.*
18. *Same.—Suicidal Tendency of Deceased.*—*Facts not Tending to Prove.*—It was not proper for the defendant to offer in evidence isolated facts as to the financial condition or domestic troubles of the deceased which would not show any suicidal tendencies on his part. *Ib.*
19. *Same.—Counsel to Assist Prosecution.*—*Appointment of in Absence of Defendant.*—The court may appoint counsel to assist in the prosecution of a felony in the absence of the defendant, this being no part of the trial. *Ib.*
20. *Larceny.—Burglary.—Misjoinder of Counts.*—The joinder of counts for larceny and obtaining the same goods by burglary is expressly authorized by section 1748, R. S. 1881, and it is not necessary that it should affirmatively appear in either count of the indictment that the goods mentioned in each are identical. It is sufficient when the contrary does not appear. *McCullough v. State, 427*
21. *Same.—Compelling Prosecuting Attorney to Elect.*—*Discretionary with the Court.*—The power of compelling the prosecuting attorney to elect upon which count he will proceed is discretionary with the court, and will not be disturbed unless there is an abuse of discretion. *Ib.*
22. *Same.—Finding and Judgment Contrary to Evidence and Beyond Charge.—Misprision of Judge.—Presumption as to.*—Where the finding and judgment of the court were that the defendant "is guilty of burglary and grand larceny," and the indictment only charged burglary and petit larceny it can not be assumed, as against the repeated statement in the record that it was a mere clerical error, and the finding of guilty of grand larceny being beyond the charge in the indictment and not supported by the evidence, and the punishment not being in accordance with that laid down for burglary, the judgment must be reversed. *Ib.*
23. *Prosecution for Petit Larceny.—Description of Money in Indictment.*—In a prosecution for petit larceny, for the theft of money, an allegation in the indictment that the defendant "did then and there unlawfully and feloniously steal, take and carry away six dollars in money, of the value of six dollars," furnishes a sufficient description of the alleged stolen property under section 1750, R. S. 1881. While it is not competent for the Legislature to dispense with all description, it is competent for it to prescribe rules for the description of property in such cases, and to declare what shall be a sufficient description. *Randall v. State, 539*
24. *Same.—Character Witness.—Cross-Examination of.—Discretion of Court.*—Where a witness had testified to a knowledge of the character of the accused, and that it was good, the extent to which the cross-examination may be carried rests largely within the discretion of the trial court. It can not be said that there was an abuse of such discretion in permitting a character witness for defendant, charged with petit larceny, to testify on cross-examination that he had heard that the defendant had previously been arrested in another county on a charge of malicious trespass, and that he had learned that the accused had been convicted, fined and imprisoned for shooting a turkey. *Ib.*

25. *Same.—Evidence.—Improper Conduct of Prosecuting Attorney.—When not Reversible Error.*—Where the prosecuting attorney in two instances propounded questions to witnesses (one of the witnesses being the accused) on cross-examination relating to matters plainly irrelevant and improper, the tendency of which would be to prejudice the minds of the jury against the accused, and objection was promptly interposed and sustained by the court, and thereupon the prosecutor, in the presence and hearing of the jury, stated that he expected to prove by the answers the facts detailed in the improper question, his action, while improper, was not such an irregularity as to justify a reversal of the judgment. *Ib.*
26. *Same.—Instruction to Jury.—Testimony of Accused.—Weight to be Given to.*—Where the court in one instruction told the jury that in considering the weight to be given to the testimony of the accused they might take into consideration that he was such defendant, and to what extent, if any, this fact should detract from the credibility otherwise due his testimony, and in another instruction told them that they had no right to disregard the testimony of the defendant on the ground alone that he was the defendant, and that the law presumed him to be innocent until he was proven guilty beyond a reasonable doubt, and that the law allowed him to testify in his own behalf, and that the jury should fairly and impartially consider his testimony, together with all the other evidence, there was no available error. *Ib.*

DECEDENTS' ESTATES.

1. *Real Estate by First Marriage.—Children Surviving.—Not Subject to Debts Contracted During Second Marriage.*—Where a widow re-marries, holding real estate by virtue of her previous marriage, and there are children alive by such first marriage, such real estate can not, after her death, be sold by her administrator to make assets for the payment of debts contracted during her second marriage. *Davis v. Kelly, 309*
2. *Action for Widow's Statutory Allowance.—Answer of Adultery and Champerty.—Sufficiency of Answer.*—Where an action is brought by a widow against the executor of her deceased husband to compel him to pay her \$500, as provided by law, out of the assets of the estate, and there is an answer in bar alleging that the plaintiff had lived separate from her husband and in adultery, but failing to allege that she had either left her husband or was living in adultery at the time of his death, and that the plaintiff had no interest in the prosecution of the claim, and was only suffering her name to be used in the interest of her counsel, who were to receive one-half of all the money recovered in her name, and that her brother, by previous arrangement, was to receive the other half, is bad. Even if she had made a champertous agreement she would not be bound by it, and might ignore it. *Zeigler v. Mize, 403*
3. *Land Held in Trust for First Wife.—Action by Second Wife.—Purchaser for Value.*—In an action by the second wife of deceased and his only heir by her against the heirs of the deceased by his first wife concerning a certain tract of land which was claimed by the heirs of the first wife to have been held in trust for their mother, and that it descended wholly to them, the following facts appeared in the evidence: In 1837 the father of E. F., decedent's first wife, left the State of Ohio and entered land in Huntington county. Prior to leaving there was some talk between B. and his daughter and son-in-law about entering a certain tract of land for her, adjoining certain land which her husband expected to enter on his own account. B. entered several tracts of land, and I. F., the husband of E. F., entered and paid for eighty acres with his own money. Another eighty acres was entered, B. fur-

nishing \$100, the amount necessary to make the entry; and the certificate for this entry was in the name of I. F., but was given to B. Afterwards I. F. gave B. a receipt for the \$100. Upon the execution of the certificate for the \$100, the certificate of entry was given to I. F., who obtained title, improved and occupied the land until his death. B. sued I. F. and obtained judgment for the \$100. Proof was made of statements made by I. F. to the effect that the land was bought for his first wife. I. F. executed mortgages on the land to secure the payment of his own obligations. B. stated in the presence of I. F. and his wife, without her objection, that the \$100 was a loan to I. F. There was no evidence of fraud or bad faith on the part of I. F. The court below found against the heirs of the first wife.

Held, that, on the evidence, the judgment of the court below can not be disturbed.

Held, also, that the finding was correct for the reason that J. F., the second wife of I. F., as such was a purchaser for value, and that if there was a trust she had no notice of it. *First v. First, 572*

DECLARATIONS AND ADMISSIONS.

See CRIMINAL LAW, 13 to 16; EVIDENCE, 5, 6, 10; TRUST AND TRUSTEE, 12.

DEED.

1. *Procuring of by Fraud.—Action to Recover Damages.—Unsoundness of Mind of Grantor.—Complaint.*—In an action to recover damages on the ground that a deed was procured by fraud, a paragraph of complaint is bad which proceeds upon the theory that the intestate, at the time of the execution of the deed was by reason of age and infirmity of unsound mind, and that he would not have executed the same had he been of sound mind, but which fails to state any facts showing that the intestate was of unsound mind at that time or incapable of contracting. *Batman v. Snoddy, 480*
2. *Same.—Instruction to Jury.*—An instruction to the jury that "if you find from the evidence that S. was, at the date of making said deed, a person of sound mind and capable of transacting his business you will find for the defendant," contained a correct statement of the law. *Ib.*
3. *Same.—Conveyance to Son.—Gift.*—A person of sound mind may convey his land to his son for a lawful consideration, or as a gift if he desires. *Ib.*

DEFAULT.

See JUDGMENT, 4.

DEMAND.

See STATUTE OF LIMITATIONS, 1.

DEPOSITION.

See EVIDENCE, 14.

When May be Taken.—Who Determines.—Refusal of Witness to Submit to Examination.—Contempt.—The deposition of a witness may be taken under the terms of our statute, although a state of facts does not exist at the time that would render the deposition admissible in evidence. The question as to whether a cause for taking a deposition exists is for the party who seeks to take it, and a witness may be punished for contempt for his refusal to submit to the examination. The statutes of the State do not enumerate any causes for taking depositions, but simply provide for the causes in which they may be read. See sections 423 and 432, R. S. 1881. *Wehrs v. State, 167*

DESCENTS.

See ADOPTION, 5.

Rights of Childless Widow by Second Marriage.—Life-Estate.—A childless widow by a second marriage, when children by a former marriage survive her, takes only a life-estate from her husband, and not a fee simple. *Markover v. Krauss, 294*

DESCRIPTION OF LAND.

See DRAINAGE, 14, 15; GRAVEL ROADS, 8; TAXES, 2.

DILIGENCE.

See CONTINUANCE, 1.

DISCRETION.

See COSTS; CRIMINAL LAW, 21, 24.

DISCRIMINATION.

See COMMON CARRIER, 5 to 9.

DIVORCE.

1. *Effect of Decree on Wife's Right to Husband's Real Estate.—Third Parties.*—A decree in divorce settles all property rights between husband and wife, but not between her and third parties.

Thompson v. Thompson, 288

2. *Same.—Conveyance by Wife under Coercion or Ignorance.—Suit after Divorce to Set Aside.*—In 1883 a wife through coercion and under mistake joined in the execution of a deed conveying certain real estate of her own, and thereafter continued to live with him without fear or constraint, until 1887, when she obtained a divorce from him for cruelty. During the period between the date of the conveyance and date of the divorce, she lived and cohabited with her husband without fear or constraint, and had by him two children, but never made any complaint or inquiry concerning the deed until after the trial of the divorce case. In the divorce case the husband filed an answer alleging that she had received from him certain real estate and personal property which was to be in full of all interest and claim she had in all property then or thereafter owned by both of them, and in full of alimony. After the divorce the grantee of the lands conveyed them to the husband, and she then brought suit to quiet title thereto and to cancel the deed.

Held, that she could maintain the action.

Held, that the facts stated did not show a ratification.

Held, that she was not bound to bring an action to quiet title and to cancel the deed while she was cohabiting with her husband.

Held, also, that the answer in the divorce case did not raise an issue; that the parties had no power to make a valid contract concerning alimony, and that she was not bound by the decree so far as the land in controversy was concerned. *Ib.*

3. *Same.—Contract Concerning Alimony.*—Husband and wife have no power to enter into a contract concerning alimony in a prospective divorce proceeding. *Ib.*

DRAINAGE.

1. *Drain Partially Constructed.—Duty of County Surveyor to Keep in Repair.*—When a drain was constructed as far as it was constructed under the act of March 9, 1875 (Section 1193, R. S. 1881), it was the duty of the county surveyor to have the portion constructed kept in repair, and jurisdiction was conferred upon him to do so. The propriety of making such repairs having been committed to his discretion, his decision was final. *Artman v. Wynkoop, 17*
2. *Judgment Establishing Ditch.—Correction of*—The drainage law contemplates that after judgment has been rendered by the court establishing a ditch, and ordering its construction, the case shall remain upon

the docket of the court while the ditch is in progress of construction. It is on the docket, however, only for the purpose of carrying into effect the judgment actually entered, and not for any action modifying or changing that judgment. *Perkins v. Haywood*, 95

3. *Same.—Correction of Judgment After Term.—Notice.—Waiver of.*—After the expiration of the term at which judgment has been rendered by the court establishing a ditch, no order can be made modifying or correcting the judgment, except upon notice again bringing the parties before it, or upon their voluntary appearance, and a waiver of notice by them. *Ib.*
4. *Same.—What Constitutes Waiver of Notice.*—Where, however, the court had rendered judgment against the remonstrators, establishing the ditch, and the clerk had taxed the costs of the proceedings against them, but no judgment for costs had been so entered up, and a motion was filed for a *nunc pro tunc* entry to that effect, and the remonstrators, after entering a special appearance expressly challenging the jurisdiction of the court over their persons, and before any ruling was made on that question, filed a counter-motion on the subject of costs, they thereby waived want of notice, and the action was equivalent to a full and voluntary appearance to appellee's motion. *Ib.*
5. *Same.—Judgment for Costs Against Remonstrators.—Nunc pro Tunc Entry.*—A finding and judgment against remonstrators, establishing a ditch, properly and necessarily involves a judgment for costs. See section 590, R. S. 1881. The failure of the clerk to enter, as a part of the judgment, a judgment for costs, was a mere omission to record a part of the judgment actually rendered, as shown by the record, and the omission could be supplied by a *nunc pro tunc* entry. *Ib.*
6. *Same.—Judgment Establishing Ditch.—Collateral Attack.*—The circuit court having jurisdiction over the subject-matter of the construction of public drains, the judgment of a circuit court establishing a particular drain, can not be attacked collaterally, on the ground that said drain, if constructed, will have an effect not contemplated by the Legislature in the enactment of the drainage law. *Ib.*
7. *Establishment of Ditch.—Appeal.—Right to Trial by Jury.*—In a proceeding to establish a drain, a party upon appeal to the circuit court, is entitled to a trial by jury. Under the code of 1852 he had the right to a trial by jury, and the act of 1881 (section 409, R. S. 1881) making causes which were of exclusive equitable jurisdiction prior to 1852 triable by the court, has in no way changed or interfered with such right. See also section 4302, R. S. 1881. *Bachelor v. Cole*, 143
8. *Repair of Ditch.—Performance of Work.—Surveyor's Authority Concerning.*—Where a surveyor is acting within the scope of his authority in repairing a ditch, the question as to whether he adopted the best or cheapest plan for its performance is not open to inquiry. The fact that the workmen were paid by the day—no fraud or collusion being claimed—and that no competition was invited, does not furnish an excuse to the land-owner for a refusal to reimburse the county for the expense of such work. *Scott v. Stringley*, 378
9. *Same.—Obstruction of Ditch by Others.—When no Defence to Payment of Assessments.*—Upon appeal to the circuit court from assessments levied by a county surveyor for the repair of a ditch, the appellants can not escape liability on the ground that a large part of the obstruction which rendered the cleaning of the ditch necessary was occasioned by the cattle of some of the other land-owners obstructing the ditch, and that no additional assessment had been levied against such land-owners where they made no effort to prove the amount of additional cost in removing such obstructions. In the absence of such proof the presumption is that the additional cost was merely nominal. *Ib.*

10. *Same.—Surveyor Exceeding His Authority.—Effect on Payment of Assessments.*—The fact that a county surveyor exceeded his authority in repairing a ditch will not relieve the land-owners from paying for benefits received by the doing of such work as was within the jurisdiction of the surveyor, and where the assessments levied fall short of the amount paid for the repairs by the county, the Supreme Court will presume, in the absence of evidence to the contrary, and in favor of the findings of the lower court, that the appellants' lands were not assessed for more than their just proportion of legitimate cost for repairing the ditch. *Ib.*
11. *Same.—Lands not Liable for Repairs.*—Where lands are not assessed for the construction of a ditch, they can not be assessed for its repair. Elliott's Supp., section 1193. *Ib.*
12. *Public Ditch.—Motion to Dismiss Petition.—How Made Part of Record.*—Motions to dismiss the petition for the establishment and construction of a public ditch are collateral motions, and can only be made part of the record by a special order of court or by a bill of exceptions. *Sample v. Carroll, 496*
13. *Same.—Practicability of Route.—Matter of Discretion.—Appeal.—Selection of Line of Former Ditch.*—The question of the practicability of a route to be selected for a ditch is one of discretion. The exercise of the discretion is vested in the inferior tribunal or its officers, and can not be reviewed on appeal, unless there is an abuse of discretion. The selection of the line of a former ditch is not such an abuse. *Ib.*
14. *Same.—Description of Lands.*—Where the descriptions of the tracts involved in the proceedings to construct a ditch are copied as the statute requires, from the tax duplicate, the descriptions will, *prima facie*, at least, sustain an assessment for benefits accruing from the construction of the ditch. *Ib.*
15. *Same.—Imperfect Description of Lands.—Objection Must be Specific.—Signing Christian Names by Initials.*—If land is described, although imperfectly, a remonstrator who seeks to defeat an assessment must make a timely and specific objection in the trial court. The fact that three of the twelve petitioners signed their Christian names by initials only will not defeat the assessments. *Ib.*
16. *Same.—Sufficiency of Bond.*—Where there is a bond sufficient in form and substance, signed by solvent obligors, affording ample security, and taken and approved by the auditor, the proceedings will not be dismissed. *Ib.*

EASEMENT.

Right of Way.—User.—Construction Placed Upon Contract by Parties.—Adoption of by Court.—Where a deed reserved a right of way, and provided that the same should not be fenced, and for forty years it had been maintained with gates placed across the way "at each terminus thereof," such a construction has been given the provision in the deed as precludes any of the parties from insisting that the way shall be kept entirely open, without gates at either end. The deed refers to the way as an existing one, and means, as the acts of the parties covering a period of many years clearly show, a private way, protected by gates at each end, to be opened only for the purpose of using the way. Where parties give their contract a construction, the courts will adopt that construction, and hold the parties to it.

Frazier v. Myers, 71

EJECTMENT.

Answer to Denial.—Proof of Defendant's Possession Dispensed With.—In an action of ejectment, where the defendant appears and joins issue, under which he can make a defence, proof on the part of the plaintiff

of defendant's possession is dispensed with by section 1056, R. S. 1881. The fact that he admits title in the plaintiff does not make such proof necessary, for he still has the right under his answer in denial to make any other defence he may have. *Weigold v. Pross*, 87

ELECTION.

See WILL, 1.

EMINENT DOMAIN.

Land.—Appropriation to Public Use.—Diversion to Other Use.—Where, pursuant to legislation, land is appropriated to an important public use, it can not afterwards be taken for a use wholly inconsistent and different from the first unless such, by express words, or by necessary implication, appears to be the intent of the Legislature.

City of Fort Wayne v. Lake Shore, etc., R. W. Co., 558

EQUITY.

See SPECIFIC PERFORMANCE.

1. *Action for Cancellation of Conveyance.—Trial by Jury.*—An action to have certain conveyances cancelled and the title revested in the grantor on the ground that at the date of their execution the grantor was of unsound mind and that the conveyances were procured by fraud and without consideration would, prior to the 18th day of June, 1852, have fallen within the exclusive jurisdiction of a court of equity, and it was not error to refuse to grant a trial by a jury. Section 1064, R. S. 1881. *Monnett v. Turpie*, 483
2. *Same.—Decree Affecting Lands Outside of State.*—In an equitable action, the court, having jurisdiction of the person, is able, by process against the defendants *in personam*, to enforce its decree affecting land without as well as within the State. *Ib.*

ESTOPPEL.

See LICENSE; OFFICE AND OFFICER; TRUST AND TRUSTEE, 12.

Married Woman.—Contract.—A wife can not be estopped from denying her capacity to make a contract. *Percifield v. Black*, 384

EVIDENCE.

See BILL OF EXCEPTIONS, 2; CRIMINAL LAW, 17, 18, 25; GRAVEL ROADS, 3, 9; MECHANIC'S LIEN, 5, 6; PRACTICE, 6 to 9, 11; PROCEEDINGS SUPPLEMENTARY TO EXECUTION, 2; RAILROAD, 5, 28; REAL ESTATE; TRUST AND TRUSTEE, 4 to 6; WILL, 4, 5.

1. *Motion to Strike Out.—When not Seasonably Made.*—A motion to strike out evidence is not seasonably made when it was not offered until after the close of the evidence, and there was nothing explaining or excusing the delay. *Falvey v. Jackson*, 176
2. *Objection to.—Must be Specifically Stated.—Authentication of Ordinance.*—An objection to the authentication or proof of an ordinance must be specifically pointed out. Questions will not be considered for the first time on appeal when the attention of the court below was not specifically called to the grounds of the objection. *Pennsylvania Co. v. Horton*, 189
3. *When Admissible to Show Fraud or Mistake.*—When the defendant answered by general denial, and also filed a cross-complaint, there was an issue formed under which evidence tending to prove fraud and mistake was admissible. *Ewing v. Smith*, 205
4. *Value of Life-Estate.—Non-Expert Witness.*—A witness is not competent to testify as to how much a person's life-estate would be worth at sheriff's sale, considering his age and physical condition, when he is not shown to have the slightest knowledge of the matter upon

which he necessarily gave an opinion in answering the question, viz.: the effect of the person's physical condition upon his expectancy of life.
Wilson v. Bennett, 210

5. *Advancements.—Declarations of Decedent.—Res Gestæ—Partition.*—In an action for partition where pleadings were filed which presented the question for decision whether some of the heirs of the decedent had not received property from him as an advancement, declarations of the deceased, made several years after the transaction, as to the terms upon which the money and property were turned over to his children, were too remote in point of time to be admitted in evidence as part of the *res gestæ*.
Thistlewaite v. Thistlewaite, 355
6. *Same.—Declarations Against Interest of Party Making.*—Such declarations were not admissible in evidence either upon the ground that they were declarations against the interest of the party by whom they were made, inasmuch as so far as the interest of the decedent was concerned it was immaterial whether the transfer of the money and property was by way of gift or advancement.
Ib.
7. *Same.—Exclusion of Period of Remoteness.*—Evidence that the decedent had purchased the land in controversy with money received from his first wife, the mother of the heirs, was properly excluded in view of the remoteness as to time, and its indirection as to the main question.
Ib.
8. *Same.—Conversation with Decedent.—Party Testifying Against Herself.—Remedy of Other Parties.*—A party to an action being competent to testify against herself, although her testimony embraced conversations with a person since deceased, the other parties to the action can not complain, when they failed to ask, as was their right to do, to have a specific and clear instruction directing the jury that such testimony was not competent against them.
Ib.
9. *Action upon Bond.—Plea of Non Est Factum.—Evidence Admissible Under.*—In an action upon a bond, when a plea of *non est factum* was interposed, defendants may testify as to what was done and said at the time they signed it. The fact as to whether they did or did not execute the bond could be ascertained in no better way.
State, ex rel., v. Gregory, 387
10. *Action upon Note.—Inadmissibility of Self Serving Declarations.*—Where in an action on certain notes by the administrator of the payee the decedent's brother filed a cross-complaint, alleging that the notes in suit had been endorsed to himself by the deceased in his life-time for the benefit of his sons, and claiming the ownership of the notes, declarations made by the deceased in his brother's absence, two or three years after the endorsement was made, that he had not the notes with him, but had left them with his sister, and that he had at some time had trouble with his brother, were self-serving declarations, and not admissible in evidence. So, also, were declarations made by the deceased about the time of the sale of the land in payment of which the notes were executed to him, that he intended to pay no more taxes after the sale of his land.
Schmid v. Packard, 398
11. *Same.—Similar Contemporaneous Acts.—Admissibility of.*—Evidence that on the same day the endorsements were made on the notes in suit similar endorsements were made on certain of the other notes of the deceased, and that he retained possession of these notes and collected them at or after maturity, was admissible, as it had a tendency to show that the endorsements that day made were not made with the intention of transferring the notes to his brother, but for some other purpose.
Ib.
12. *Same.—Facts, though not in issue, which are so connected with a fact in issue as to form a part of the same transaction or subject-matter,*

are relevant to the fact with which they are connected; or when they are the effect of the same cause, or show the existence of a particular course of business, or the intention with which a contemporaneous act was done. *Ib.*

13. *Intention of Attorney.*—The purpose and intention of an attorney in prosecuting a suit are not admissible in evidence.
New York, etc., R. R. Co. v. Hammond, 475
14. *Same.—Deposition.—Striking out Remote and Immaterial Matter.*—It is not error to strike matter out of a deposition which is too remote and wholly immaterial. *Ib.*
15. *Report of Drainage Commissioners not Competent—Error.*—Reports of drainage commissioners are not competent evidence on an appeal from such assessments, and when proper objections are made and exceptions are taken, the admission of such evidence will constitute reversible error.
Chandler v. Beal, 596
16. *Same.—Location of Ditch.—In Discretion of Commissioners.—Can not Review in Absence of Fraud.*—The location of a ditch upon the best, cheapest and most available route is a matter left to the judgment of the commissioners, which, in the absence of fraud, is not subject to review by the court, and evidence to that effect should be excluded. *Ib.*
17. *Same.—Exclusion of.—Immateriality.*—It was not error to refuse to allow the remonstrators to ask a witness on cross-examination if he did not go with the commissioners and direct them where to locate the ditch, as such evidence was immaterial. *Ib.*

EXEMPTION FROM EXECUTION.

Fraudulent Conveyance.—When Exemption Not Allowed.—When a conveyance is found to be fraudulent a motion to modify the judgment so as to allow defendant an exemption of \$300 out of the proceeds of the sale of the land was properly overruled no issue upon the subject having been tendered or joined by the parties, and no evidence having been introduced upon the subject at the trial and there being no proof that the party claiming the exemption was a resident householder.
Chandler v. Jessup, 351

EXHIBIT.

See PLEADING, 11.

EXPERT EVIDENCE.

See EVIDENCE, 4; RAILROAD, 8.

FELLOW-SERVANTS.

See RAILROAD, 14.

FORECLOSURE.

See BUILDING ASSOCIATION, 1, 4; MORTGAGE, 1, 3.

FRAUD.

See DEED, 1; TRUST AND TRUSTEE, 10

FRAUDULENT CONVEYANCE.

See EXEMPTION FROM EXECUTION; PLEADING, 1.

1. *Husband and Wife.—Transfer of Property to Wife.—Valid Indebtedness.—Rights of Creditors.*—Where a husband, when he was perfectly solvent, and long before the debt in suit was contracted, gave his wife a sum of money which she kept for several months and then loaned to him, under an agreement that he would repay it, and he transferred to her an interest in a farm in payment thereof, her said interest can not be subjected to the payment of her husband's indebtedness.

Dillen v. Johnson, 75

2. *Volunteer.—Fraudulent Intent of Grantor.—Notice of to Grantee Unnecessary.*—It is not necessary for the purpose of setting aside a fraudulent conveyance to a volunteer, who paid no consideration, to allege and prove notice to the grantee of the fraudulent intent of the grantor.
York v. Rockwood, 358
3. *Same.—Complaint.—Averment of Grantor's Insolvency.—Sufficiency of.*—The averment in the complaint that the grantor did not have at the time of the conveyance, nor has he had since, or at the time of the commencement of the action, sufficient property subject to execution to pay his debts, is a sufficient allegation as to his insolvency during that time. *Ib.*
4. *Pleading.—Necessary Averment.*—A cross-complaint based upon the theory that a conveyance is fraudulent, is bad if it does not aver that, at the time it was executed, the grantor had no other property subject to execution.
Winstandley v. Stipp, 648

FRAUDULENT REPRESENTATIONS.

Real Estate.—Sufficiency of Complaint.—Vendor's Lien.—In an action to recover damages because of fraudulent representations alleged to have been made by the defendants in a real estate trade, the complaint alleged that the defendants were partners residing at Portland, in Jay county, and were engaged in the practice of law and in the real estate business; that the plaintiff owned a farm in said county and placed it in the hands of the defendants for sale; that after failing to sell it for several months defendants purchased it themselves and conveyed to them a tract of land situated in Kansas; that the defendants made certain false and fraudulent representations concerning the Kansas land, which were relied upon by the plaintiff, and by reason of which he was induced to accept the land at the price agreed upon; that if the land had been as represented it would have been worth the price, but that the representations were false, and the land was worth a much less price.

Held, that the complaint stated a good cause of action.

Held, also, that upon the averments of the complaint the plaintiff was entitled to a vendor's lien for such amount as might be found due on account of the difference in the value of the land.

Williamson v. Woten, 202

GENERAL AVERAGE.

See MARINE INSURANCE, 1.

GRAVEL ROADS.

1. *Construction of.—What Does Not Disqualify Engineer.*—The fact that the person appointed as engineer and surveyor for the location and construction of a free gravel road was the owner of real estate within the limits assessable for the construction of said road, and which was reported as benefited, and was a brother-in-law of one who also owned lands within the limits assessable for the road, and which was reported as benefited, did not disqualify him from serving in that capacity. The statutes of this State do not provide that the engineer shall be either disinterested or a freeholder, or even a resident of the county, but simply that he shall be a competent engineer. The engineer is not a member of the board of viewers, and has nothing to do with the assessments to be made.
Thompson v. Goldthwait, 20
2. *Construction of.—Extra Services Rendered by Contractor.—Liability of County Commissioners for.*—Where a board of county commissioners entered into a contract with the appellees to construct a free gravel road, and the work was completed according to the contract, but during its progress the appellees, at the request of the board, performed

extra services not embraced in the contract, the extra work being required by reason of changes made by the board and its engineer, an action may be maintained against the board for the value of such extra services. *Board, etc., v. Fahlor*, 114 Ind. 176, distinguished.

Board, etc., v. Newlin, 27

3. *Same.—Evidence.—Acceptance of Work by Engineer.*—It was proper for the appellees to prove that the engineer had accepted the road, since the contract provided for its acceptance by him, and his certificate was competent evidence of acceptance. *Ib.*
4. *Including of Within Municipal Limits.—Exaction of Tolls.—How Affected.*—The extension of the limits of a municipal corporation, so as to embrace a turnpike owned by a private corporation can not take from the corporation the right to exact tolls.
Fort Wayne, etc., Co. v. Maumee, etc., G. R. Co., 80
5. *Same.—Answer in Justification.*—An answer in justification is had which assumes that the defendants had a right to the road within the corporate limits, the answer alleging that "said road when said acts complained of were done, became a public street of said city," and admitting the destruction of a toll house and gate belonging to the turnpike company, but attempting to justify the act by alleging that they were worthless. If the toll house was the property of the turnpike company the defendants had no right to remove or confiscate it, even if it was valueless. An answer in justification must fully justify the wrongful acts charged in the complaint, or it will be insufficient. *Ib.*
6. *Proceedings to Construct, Before County Commissioners.—Appeal to Circuit Court.—Special Verdict.*—Where, in a proceeding for the construction of a free gravel road, an appeal is taken to the circuit court, the special verdict need not find who own a majority of the acres which are benefited, neither need it find that all the land-owners in the county whose lands are benefited have signed the petition without regard to the fact that they have not been included in the report of the viewers. The verdict is sufficient if it discloses the fact that the names and acres named therein constitute a majority of the names and acres reported by the viewers as benefited. See section 5095, R. S. 1881. The only mode by which the commissioners can determine its jurisdiction to make the order for the improvement is by comparing the names and acres found in the report of the viewers with the names found on the petition. *Fulton v. Cummings*, 453
7. *Same.—Trial de Novo.*—Upon appeal from the finding of the board of county commissioners the cause is tried *de novo*, but no question can be tried on appeal that was not presented to the board of commissioners before the appeal was taken. *Ib.*
8. *Same.—Special Verdict.—Description of Lands*—Where the lands of the appellants are sufficiently described in the special verdict, they can not complain that other descriptions are vague and uncertain. *Ib.*
9. *Same.—Evidence.—Report of Viewers.*—Upon appeal it was proper to allow the report of the viewers made to the board of commissioners with a plat of the lands reported benefited attached as an exhibit to be read to the jury, the court instructing the jury that the contents of these papers was not evidence of the facts therein contained. Without this report before them the jury could not intelligently apply the evidence adduced to the jurisdictional facts of the case. *Ib.*
10. *Same.—Report of Viewers.—Binding Upon Parties.*—It was not error to refuse to permit the appellant to prove that land outside the territory fixed by the viewers would be benefited by the proposed improvements. Unless the report of the viewers is attacked before the board of com-

missioners upon the ground that it does not contain all the land benefited, the parties interested are bound by the report of the viewers as to the limit of the territory to be assessed. *Ib.*

11. *Same.—Incompetency of Jury.—Relationship.*—One of the jurors answered upon his examination that he was not related to a family residing in the vicinity of the proposed improvement. He was in fact a full cousin of the wife of one of the members of said family whose lands were assessed for the improvement, but the husband was neither a petitioner nor a remonstrant, nor was he a party to the appeal to the circuit court.

Held, that as he was not in the circuit court no judgment could be rendered affecting his rights, and this being so, that the juror was not disqualified to serve because of the relationship to his wife. *Ib.*

12. *Same.—Appeal to Circuit Court.—Cause Certified Back to Commissioners.—Reappointment of Old Viewers.*—Where an order was made by the board of county commissioners for the construction of a free gravel road, and upon appeal to the circuit court the order was set aside as to one of the parties alone upon the ground that he had not received proper notice, and the cause was certified back to the board for further proceedings, it was not error for the board to reappoint the old viewers, it not being claimed that they were guilty of any partiality in the discharge of their duties. *Ib.*

13. *Same.—Report of Viewers.—Correction of.—New Notice.*—If the report as originally filed by the viewers was defective, it was proper for the board to refer it back to them for correction, they not having been discharged. A new notice was not necessary. *Ib.*

14. *Same.—Inequalities in Proceedings Before Commissioners.—When May be Disregarded.*—Unless the inequalities in the proceedings before the board of county commissioners in a proceeding to construct a free gravel road are of a character which affect the substantial rights of the parties, they should be wholly disregarded. *Ib.*

GARNISHMENT.

See ATTACHMENT.

GUARDIAN AND WARD.

Real Estate.—Conversion of Funds.—Additional Bond.—Action Upon.—A guardian of certain minor children was about to receive money resulting from the sale of real estate of the wards in another State. The court ordered the guardian to give another bond before receiving the proceeds of said sale, which he did, and after receiving the money and accounting with some of the wards when they became of age, he converted the remaining funds to his own use and left the State. The court removed him as guardian, and appointed another guardian in his stead, who instituted suit on the second bond for the money converted. The defendants answered that the bondsmen on the first bond were solvent, and that no steps had been taken to recover the money converted from them. This answer was demurred to, and the demurrer was overruled.

Held, that as there is nothing to indicate any intention to make the second bond subsidiary to the first, but on its face it appears to be a primary security for the money, suit could properly be instituted on the second bond alone, or on the first and second bonds together, or on the first bond alone, as they were both primary undertakings relating to the same matter. *State, ex rel., v. Mitchell, 461*

HARMLESS ERROR.

See MECHANIC'S LIEN, 6; PRACTICE, 7.

HABEAS CORPUS.

1. *Review of Magistrate's Decision Holding Prisoner in Custody.*—If the committing magistrate has jurisdiction to order a person accused of crime into custody, a writ of *habeas corpus* will not issue to secure his release. *Turner v. Conkey*, 2:2
2. *Same.*—*Collateral Attack on Justice's Judgment.*—The judgment of a justice of the peace holding a prisoner in custody for trial can not be assailed upon a petition for a writ of *habeas corpus*. *Snider v. Lockhart*, 97 Ind. 315, overruled. *Ib.*

HIGHWAY.

1. *Location of.*—*Report of Viewers.*—*Public Utility.*—In the matter of the location and opening of a highway the statute does not require the viewers to state in their report that the road will be of public utility. Their report recommending the opening of the road is a sufficient expression of their judgment that it will be of public utility. *McKee v. Gould*, 108 Ind. 107, *Jones v. Duffy*, 118 Ind. 440, *Bowman v. Jobs*, 123 Ind. 44, distinguished. *Campbell v. Fogg*, 1
2. *Same.*—*Description of.*—*Report of Viewers Must Contain.*—The viewers must give a description of the location of the proposed highway by metes and bonds. For sufficiency of description see opinion. *Ib.*
3. *Same.*—*Selection of "Best Ground."*—*Report Need not State.*—While the statute makes it the duty of the viewers to "locate and mark" the highway "on the best ground," they are not required to state in their report that they have selected the best ground for the route of the proposed highway. *Ib.*

HUSBAND AND WIFE.

See FRAUDULENT CONVEYANCE, 1; TRUST AND TRUSTEE, 1; WILL, 1.

INJUNCTION.

See MUNICIPAL CORPORATIONS.

1. *Establishment of Highway.*—*Disobedience of Mandate.*—*Contempt of Court.*—Where the board of county commissioners appointed viewers and laid out and established a highway on a section line in a certain township, and the supervisors of certain road districts in said township were mandated to open up said highway on said section line, but disregarding said mandate, they proceeded to open up said highway on a different line, and for that purpose were endeavoring to wrongfully take possession of a portion of the appellee's real estate, and to permanently deprive him of the same, the latter may enjoin them from so doing. The fact that the defendants were liable to punishment for contempt in disobeying the mandate of the court would not prevent the appellee from proceeding against them by way of injunction. *Kern v. Isgrigg*, 4
2. *Interlocutory Order in Vacation.*—*Appeal to Supreme Court.*—*When and how Bond may be Filed.*—When an appeal is prosecuted to the Supreme Court from an interlocutory order of injunction granted in vacation, and the *nisi prius* judge made an order granting the appeal, and directed that a bond be filed, fixing the penalty of the bond, and the time within which it should be filed, and the record shows the filing of a bond in the prescribed penalty within the time limited, and that it was approved by the clerk as in other cases of appeals taken in vacation, the appeal is properly taken. See sections 646, clause 3, and 647, R. S. 1881. *Miller v. Burket*, 469
3. *Same.*—*Threatened Trespass.*—*Complaint.*—*Inadequacy of Averments.*—When all the averments of a complaint seeking an injunction, taken together, charge a mere threatened trespass, continuous only in a limited sense, as in the case at bar, continuing only long enough to

cut and remove the wheat mentioned in the complaint, and there is no averment of the insolvency of the defendant, there is not a sufficient showing to authorize the granting of an injunction. From anything appearing in the complaint, the defendant may be amply able, pecuniarily, to respond in damages, and no injury is shown to be threatened for which ample compensation may not be made in damages. *Ib.*

4. *Natural Gas.—Grant of Free Use of.—Improper Action of Officers of Corporation.*—Where the president and secretary of a natural gas company, with the consent of one S., who was a director of the company, but against the will and without the consent of the board of directors, granted to D. the right to take gas from the well of the company free of charge, to be used by him in his business, an injunction will lie against said D. and the officers of the company who granted the privilege to him to prevent such use of the gas.

Henshaw v. People's, etc., Co., 545

INSTRUCTIONS TO JURY.

See COMMON CARRIER, 10; CRIMINAL LAW, 4, 5, 8, 10, 26; DEED, 2; RAILROAD, 12, 13, 22 to 27.

1. *Omission of Statement of Fact.*—When instructions are given to the jury applicable to the law of the case they are not objectionable because they do not state any facts, nor advise the jury what the plaintiff should have done under the circumstances to have shown him to be in the exercise of due care. *Pennsylvania Co. v. Horton, 189*
2. *Refusal to Give.—When Reversible Error.*—On the trial of a cause the appellant asked the court to give the following instruction, which was refused: "If you find from the evidence that a witness who has testified in the case is a person of bad moral character, you should consider that fact in determining what weight, if any, you will give to his testimony." There being evidence tending to establish the fact covered by the instruction, and no other instruction bearing upon the same fact being given by the court, the refusal to give the instruction was reversible error. *Ohio, etc., R. W. Co. v. Craucher, 276*
3. *Joint Exception.—Separate Instructions not Brought in Review.*—A joint exception to the giving of two instructions, assigned as a reason for a new trial, does not bring in review the instructions given severally or separately, and one of such instructions being conceded to be correct, the other will not be examined by the Supreme Court. *State, ex rel., v. Gregory, 387*
4. *Pleadings.—Variance.—Reversible Error.*—Where there is not such a variance between the facts alleged in a cause of action and those enumerated in an instruction as to actually mislead the adverse party, the giving of the instruction is not reversible error. *Louisville, etc., R. W. Co. v. Shanks, 395*
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6. *When not Error to Refuse to Give.*—It is not error to refuse to give an instruction when there are other instructions given quite as favorable as the one refused. *Ohio, etc., R. W. Co. v. Stansberry, 533*
7. *Same.—Comment on While Reading.—When Error.*—When a judge in reading instructions to a jury stopped and said: "That's not correct; I'll read that again," and thereupon re-read the instruction, the statement of the judge, not bearing upon a question of law or fact involved in the case, is not to be taken as a part of the instruction, and was not erroneous. *Ib.*

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INSURANCE.

1. *Action on Policy.—Condition Against Other Insurance.—Answer.—Pleading Additional Insurance.—Sufficiency of.*—In an action to recover on a policy of fire insurance containing a condition avoiding it if the insured should obtain other insurance without the consent of the company, when a copy of the policy is filed with the complaint, a special answer in confession and avoidance averring a violation of such condition is not demurrable because a copy of the policy is not filed with the answer. It was not necessary either to allege in such answer that the additional insurance was in force when the loss occurred. If the policy in suit was avoided by the additional insurance, it was avoided when the additional policy was taken, and it is immaterial whether the new policy was still in force when the loss occurred or not.
Repogle v. American Ins. Co., 360
2. *Same.—Reply Averring Additional Insurance to be Invalid.*—To an answer pleading a violation of the stipulation against other insurance, a reply was bad which averred that the second policy contained a provision on that subject similar to the one in the policy sued on; that when it was issued, the policy sued on was in full force; that the assured did not notify the second insurer of the existence of the first policy, and that that company never at any time, nor in any manner, consented to the additional insurance.
Ib.
3. *Same.—Charter Prohibition Against Insuring Property Already Insured.*—The fact that the charter of the second company contained a provision prohibiting it from insuring property already insured, and declaring policies issued in violation thereof void, did not render the first policy effective. The presumption is that the party procuring the second policy did so with the intention of availing himself of the protection which it *prima facie* afforded him.
Ib.
4. *Same.—Waiver of Broken Condition.—What Constitutes.—Proof of Loss, etc.*—A forfeiture of an insurance policy, by reason of a violation of one of its conditions by the assured, is waived by the company when in the full knowledge of the facts it not only required the assured to make proofs of his loss, but after he had made proofs required him to make additional proofs, and to furnish plans and specifications of the buildings destroyed, and to expend money in travelling and other expenses.
Ib.
5. *Same.—Reply.—Pleading Waiver.—Sustaining Demurrer To.—When not Harmless Error.*—It was not harmless error to sustain a demurrer to a reply setting up such a waiver of the forfeiture by the company, since neither under the general denial contained in the reply nor under the allegation in the complaint that the insured had furnished the proofs of loss was evidence admissible as to the making of the additional proofs of loss, and of the furnishing of plans and specifications of the building destroyed, and of the travelling and other expenses.
Ib.
6. *Same.—Adoption of Theory by Court.—Presumption that it will be Adhered to.—Effect of Presumption.*—Where the trial court, by sustaining the demurrer, held that such facts as were pleaded, even if proven, would not constitute a waiver, the presumption is that having by the ruling adopted such a theory it adhered to it throughout the case, and admitted no evidence, and made no finding relative to such alleged facts. It will be presumed, also, that whatever evidence, if any, the appellant may have had in support of this paragraph of reply it was not offered, and would, therefore, not appear in the record. The appellant had the right to assume that the court would adhere to the theory indicated by its ruling in sustaining the demurrer. Under this state of facts the Supreme Court will not look to the finding of facts by the court and to the conclusions of law for assurance that there was no waiver of the forfeiture.
Ib.

7. *Action on Policy.—Sufficiency of Complaint After Verdict.—Averment as to Ownership.—Performance of Condition.*—In an action on a policy of fire insurance, where the sufficiency of the complaint is not challenged until after the verdict has been returned, an allegation in the complaint that the plaintiff was the owner of the property at the time of its destruction by fire, is a sufficient allegation that he was the owner in fee of the real estate and the absolute owner of the personal property. Where the complaint alleged in detail a performance of the condition resting upon the assured, a general allegation of the performance was unnecessary. *Phenix Ins. Co. v. Wilson, 449*
8. *Same.—Complaint.—Averment Concerning Proof of Loss.*—An allegation that the second day after the fire the plaintiff gave notice thereof in writing to the company at its office as by the policy provided, is sufficient after verdict to show that proofs of loss were duly furnished. *Ib.*
9. *Same.—Interrogatories in Application.—Answers to.—Age and Value of Building.—Expression of Opinion.*—Where by the terms of a policy of fire insurance answers to interrogatories in the application are made warranties, answers as to the age and value of the building insured will be regarded as mere expressions of opinion. *Ib.*

INTERLOCUTORY ORDER.

See INJUNCTION, 2.

INTERROGATORIES TO JURY.

1. *Dividing Interrogatory.—Party Complaining Must Affirmatively Show that he is Injured Thereby.*—Where the claim is made that the court erred in dividing an interrogatory asked by a party, and in submitting it to the jury as two interrogatories, it must affirmatively appear from the record that the party complaining of this action of the court was thereby injured. *British-American, etc., Co. v. Wilson, 278*
 2. *Same.—Antagonism, Degree of, How Must Appear.*—The antagonism between the special findings and the general verdict must be apparent on the face of the record beyond the possibility of being removed by any evidence legitimately admissible under the issues. *Ib.*
 3. *Same.—Evidence Can Not Be Considered.*—In passing upon the antagonism between the general verdict and the interrogatories, the evidence can not be considered. *Ib.*
 4. *Same.—Presumption in Aid of.*—No presumption in aid of the answers to interrogatories will be indulged in by the court on a motion for judgment on such interrogatories, all reasonable presumptions and intendment being against them. *Ib.*
 5. *Motion to Recommit.—How Brought into the Record.—Appeal.*—A motion to recommit interrogatories to a jury for more specific answers must be brought into the record by transcription, and not by mere recitals of the clerk, or it can not be considered on appeal. *Louisville, etc., R. W. Co. v. Shanks, 396*
 6. *Must Not Involve a Question of Law.*—In connection with other interrogatories which were submitted to the jury, the court refused to submit the following: "11. Q. If plaintiff did not look to see where she was stepping when she alighted, what reason or excuse was there for her not doing so? 12. Q. If you answer question eleven affirmatively, if there was any other reason or excuse, state fully what it was."
- Held*, that an answer to these interrogatories would necessarily have involved a question of law, which can not be submitted to a jury by interrogatories. *Ohio, etc., Co. v. Stansberry, 533*

extra services not embraced in the contract, the extra work being required by reason of changes made by the board and its engineer, an action may be maintained against the board for the value of such extra services. *Board, etc., v. Fahlor*, 114 Ind. 176, distinguished.

Board, etc., v. Newlin, 27

3. *Same.—Evidence.—Acceptance of Work by Engineer.*—It was proper for the appellees to prove that the engineer had accepted the road, since the contract provided for its acceptance by him, and his certificate was competent evidence of acceptance. *Ib.*
4. *Including of Within Municipal Limits.—Exaction of Tolls.—How Affected.*—The extension of the limits of a municipal corporation, so as to embrace a turnpike owned by a private corporation can not take from the corporation the right to exact tolls.
Fort Wayne, etc., Co. v. Maumee, etc., G. R. Co., 80
5. *Same.—Answer in Justification.*—An answer in justification is bad which assumes that the defendants had a right to the road within the corporate limits, the answer alleging that "said road when said acts complained of were done, became a public street of said city," and admitting the destruction of a toll house and gate belonging to the turnpike company, but attempting to justify the act by alleging that they were worthless. If the toll house was the property of the turnpike company the defendants had no right to remove or confiscate it, even if it was valueless. An answer in justification must fully justify the wrongful acts charged in the complaint, or it will be insufficient. *Ib.*
6. *Proceedings to Construct, Before County Commissioners.—Appeal to Circuit Court.—Special Verdict.*—Where, in a proceeding for the construction of a free gravel road, an appeal is taken to the circuit court, the special verdict need not find who own a majority of the acres which are benefited, neither need it find that all the land-owners in the county whose lands are benefited have signed the petition without regard to the fact that they have not been included in the report of the viewers. The verdict is sufficient if it discloses the fact that the names and acres named therein constitute a majority of the names and acres reported by the viewers as benefited. See section 5095, R. S. 1881. The only mode by which the commissioners can determine its jurisdiction to make the order for the improvement is by comparing the names and acres found in the report of the viewers with the names found on the petition. *Fullon v. Cummings*, 453
7. *Same.—Trial de Novo.*—Upon appeal from the finding of the board of county commissioners the cause is tried *de novo*, but no question can be tried on appeal that was not presented to the board of commissioners before the appeal was taken. *Ib.*
8. *Same.—Special Verdict.—Description of Lands.*—Where the lands of the appellants are sufficiently described in the special verdict, they can not complain that other descriptions are vague and uncertain. *Ib.*
9. *Same.—Evidence.—Report of Viewers.*—Upon appeal it was proper to allow the report of the viewers made to the board of commissioners with a plat of the lands reported benefited attached as an exhibit to be read to the jury, the court instructing the jury that the contents of these papers was not evidence of the facts therein contained. Without this report before them the jury could not intelligently apply the evidence adduced to the jurisdictional facts of the case. *Ib.*
10. *Same.—Report of Viewers.—Binding Upon Parties.*—It was not error to refuse to permit the appellant to prove that land outside the territory fixed by the viewers would be benefited by the proposed improvements. Unless the report of the viewers is attacked before the board of com-

missioners upon the ground that it does not contain all the land benefited, the parties interested are bound by the report of the viewers as to the limit of the territory to be assessed. *Ib.*

11. *Same.—Incompetency of Jury.—Relationship.*—One of the jurors answered upon his examination that he was not related to a family residing in the vicinity of the proposed improvement. He was in fact a full cousin of the wife of one of the members of said family whose lands were assessed for the improvement, but the husband was neither a petitioner nor a remonstrant, nor was he a party to the appeal to the circuit court.

Held, that as he was not in the circuit court no judgment could be rendered affecting his rights, and this being so, that the juror was not disqualified to serve because of the relationship to his wife. *Ib.*

12. *Same.—Appeal to Circuit Court.—Cause Certified Back to Commissioners.—Reappointment of Old Viewers*—Where an order was made by the board of county commissioners for the construction of a free gravel road, and upon appeal to the circuit court the order was set aside as to one of the parties alone upon the ground that he had not received proper notice, and the cause was certified back to the board for further proceedings, it was not error for the board to reappoint the old viewers, it not being claimed that they were guilty of any partiality in the discharge of their duties. *Ib.*

13. *Same.—Report of Viewers.—Correction of.—New Notice.*—If the report as originally filed by the viewers was defective, it was proper for the board to refer it back to them for correction, they not having been discharged. A new notice was not necessary. *Ib.*

14. *Same.—Inequalities in Proceedings Before Commissioners.—When May be Disregarded.*—Unless the inequalities in the proceedings before the board of county commissioners in a proceeding to construct a free gravel road are of a character which affect the substantial rights of the parties, they should be wholly disregarded. *Ib.*

GARNISHMENT.

See ATTACHMENT.

GUARDIAN AND WARD.

Real Estate.—Conversion of Funds.—Additional Bond.—Action Upon.—A guardian of certain minor children was about to receive money resulting from the sale of real estate of the wards in another State. The court ordered the guardian to give another bond before receiving the proceeds of said sale, which he did, and after receiving the money and accounting with some of the wards when they became of age, he converted the remaining funds to his own use and left the State. The court removed him as guardian, and appointed another guardian in his stead, who instituted suit on the second bond for the money converted. The defendants answered that the bondsmen on the first bond were solvent, and that no steps had been taken to recover the money converted from them. This answer was demurred to, and the demurrer was overruled.

Held, that as there is nothing to indicate any intention to make the second bond subsidiary to the first, but on its face it appears to be a primary security for the money, suit could properly be instituted on the second bond alone, or on the first and second bonds together, or on the first bond alone, as they were both primary undertakings relating to the same matter. *State, ex rel., v. Mitchell, 461*

HARMLESS ERROR.

See MECHANIC'S LIEN, 6; PRACTICE, 7.

HABEAS CORPUS.

1. *Review of Magistrate's Decision Holding Prisoner in Custody.*—If the committing magistrate has jurisdiction to order a person accused of crime into custody, a writ of *habeas corpus* will not issue to secure his release. *Turner v. Conkey*, 248
2. *Same.*—*Collateral Attack on Justice's Judgment.*—The judgment of a justice of the peace holding a prisoner in custody for trial can not be assailed upon a petition for a writ of *habeas corpus*. *Smelser v. Lockhart*, 97 Ind. 315, overruled. *Ib.*

HIGHWAY.

1. *Location of.*—*Report of Viewers.*—*Public Utility.*—In the matter of the location and opening of a highway the statute does not require the viewers to state in their report that the road will be of public utility. Their report recommending the opening of the road is a sufficient expression of their judgment that it will be of public utility. *McKee v. Gould*, 108 Ind. 107, *Jones v. Duffy*, 118 Ind. 440, *Boorman v. Jobe*, 123 Ind. 44, distinguished. *Campbell v. Fogg*, 1
2. *Same.*—*Description of.*—*Report of Viewers Must Contain.*—The viewers must give a description of the location of the proposed highway by metes and bonds. For sufficiency of description see opinion. *Ib.*
3. *Same.*—*Selection of "Best Ground."*—*Report Need not State.*—While the statute makes it the duty of the viewers to "locate and mark" the highway "on the best ground," they are not required to state in their report that they have selected the best ground for the route of the proposed highway. *Ib.*

HUSBAND AND WIFE.

See FRAUDULENT CONVEYANCE, 1; TRUST AND TRUSTEE, 1; WILL, 1.

INJUNCTION.

See MUNICIPAL CORPORATIONS.

1. *Establishment of Highway.*—*Disobedience of Mandate.*—*Contempt of Court.*—Where the board of county commissioners appointed viewers and laid out and established a highway on a section line in a certain township, and the supervisors of certain road districts in said township were mandated to open up said highway on said section line, but disregarding said mandate, they proceeded to open up said highway on a different line, and for that purpose were endeavoring to wrongfully take possession of a portion of the appellee's real estate, and to permanently deprive him of the same, the latter may enjoin them from so doing. The fact that the defendants were liable to punishment for contempt in disobeying the mandate of the court would not prevent the appellee from proceeding against them by way of injunction. *Kern v. Isgrigg*, 4
2. *Interlocutory Order in Vacation.*—*Appeal to Supreme Court.*—*When and how Bond may be Filed.*—When an appeal is prosecuted to the Supreme Court from an interlocutory order of injunction granted in vacation, and the *nisi prius* judge made an order granting the appeal, and directed that a bond be filed, fixing the penalty of the bond, and the time within which it should be filed, and the record shows the filing of a bond in the prescribed penalty within the time limited, and that it was approved by the clerk as in other cases of appeals taken in vacation, the appeal is properly taken. See sections 646, clause 3, and 647, R. S. 1881. *Miller v. Burkett*, 469
3. *Same.*—*Threatened Trespass.*—*Complaint.*—*Inadequacy of Averments.*—When all the averments of a complaint seeking an injunction, taken together, charge a mere threatened trespass, continuous only in a limited sense, as in the case at bar, continuing only long enough to

cut and remove the wheat mentioned in the complaint, and there is no averment of the insolvency of the defendant, there is not a sufficient showing to authorize the granting of an injunction. From anything appearing in the complaint, the defendant may be amply able, pecuniarily, to respond in damages, and no injury is shown to be threatened for which ample compensation may not be made in damages. *Ib.*

4. *Natural Gas.—Grant of Free Use of.—Improper Action of Officers of Corporation.*—Where the president and secretary of a natural gas company, with the consent of one S., who was a director of the company, but against the will and without the consent of the board of directors, granted to D. the right to take gas from the well of the company free of charge, to be used by him in his business, an injunction will lie against said D. and the officers of the company who granted the privilege to him to prevent such use of the gas. *Henshaw v. People's, etc., Co., 545*

INSTRUCTIONS TO JURY.

See COMMON CARRIER, 10; CRIMINAL LAW, 4, 5, 8, 10, 26; DEED, 2; RAILROAD, 12, 13, 22 to 27.

1. *Omission of Statement of Fact.*—When instructions are given to the jury applicable to the law of the case they are not objectionable because they do not state any facts, nor advise the jury what the plaintiff should have done under the circumstances to have shown him to be in the exercise of due care. *Pennsylvania Co. v. Horton, 189*
2. *Refusal to Give.—When Reversible Error.*—On the trial of a cause the appellant asked the court to give the following instruction, which was refused: "If you find from the evidence that a witness who has testified in the case is a person of bad moral character, you should consider that fact in determining what weight, if any, you will give to his testimony." There being evidence tending to establish the fact covered by the instruction, and no other instruction bearing upon the same fact being given by the court, the refusal to give the instruction was reversible error. *Ohio, etc., R. W. Co. v. Craucher, 276*
3. *Joint Exception.—Separate Instructions not Brought in Review.*—A joint exception to the giving of two instructions, assigned as a reason for a new trial, does not bring in review the instructions given severally or separately, and one of such instructions being conceded to be correct, the other will not be examined by the Supreme Court. *State, ex rel., v. Gregory, 387*
4. *Pleadings.—Variance.—Reversible Error.*—Where there is not such a variance between the facts alleged in a cause of action and those enumerated in an instruction as to actually mislead the adverse party, the giving of the instruction is not reversible error. *Louisville, etc., R. W. Co. v. Shanks, 395*
5. *Same.—Refusal to Give.—When Not Error.*—A refusal to give an instruction which is not in terms correct is not error. *Ib.*
6. *When not Error to Refuse to Give.*—It is not error to refuse to give an instruction when there are other instructions given quite as favorable as the one refused. *Ohio, etc., R. W. Co. v. Stansberry, 533*
7. *Same.—Comment on While Reading.—When Error.*—When a judge in reading instructions to a jury stopped and said: "That's not correct; I'll read that again," and thereupon re-read the instruction, the statement of the judge, not bearing upon a question of law or fact involved in the case, is not to be taken as a part of the instruction, and was not erroneous. *Ib.*

INSURANCE.

1. *Action on Policy.—Condition Against Other Insurance.—Answer.—Pleading Additional Insurance.—Sufficiency of.*—In an action to recover on a policy of fire insurance containing a condition avoiding it if the insured should obtain other insurance without the consent of the company, when a copy of the policy is filed with the complaint, a special answer in confession and avoidance averring a violation of such condition is not demurrable because a copy of the policy is not filed with the answer. It was not necessary either to allege in such answer that the additional insurance was in force when the loss occurred. If the policy in suit was avoided by the additional insurance, it was avoided when the additional policy was taken, and it is immaterial whether the new policy was still in force when the loss occurred or not.
Replegle v. American Ins. Co., 360
2. *Same.—Reply Averring Additional Insurance to be Invalid.*—To an answer pleading a violation of the stipulation against other insurance, a reply was bad which averred that the second policy contained a provision on that subject similar to the one in the policy sued on; that when it was issued, the policy sued on was in full force; that the assured did not notify the second insurer of the existence of the first policy, and that that company never at any time, nor in any manner, consented to the additional insurance.
Ib.
3. *Same.—Charter Prohibition Against Insuring Property Already Insured.*—The fact that the charter of the second company contained a provision prohibiting it from insuring property already insured, and declaring policies issued in violation thereof void, did not render the first policy effective. The presumption is that the party procuring the second policy did so with the intention of availing himself of the protection which it *prima facie* afforded him.
Ib.
4. *Same.—Waiver of Broken Condition.—What Constitutes.—Proof of Loss, etc.*—A forfeiture of an insurance policy, by reason of a violation of one of its conditions by the assured, is waived by the company when in the full knowledge of the facts it not only required the assured to make proofs of his loss, but after he had made proofs required him to make additional proofs, and to furnish plans and specifications of the buildings destroyed, and to expend money in travelling and other expenses.
Ib.
5. *Same.—Reply.—Pleading Waiver.—Sustaining Demurrer To.—When not Harmless Error.*—It was not harmless error to sustain a demurrer to a reply setting up such a waiver of the forfeiture by the company, since neither under the general denial contained in the reply nor under the allegation in the complaint that the insured had furnished the proofs of loss was evidence admissible as to the making of the additional proofs of loss, and of the furnishing of plans and specifications of the building destroyed, and of the travelling and other expenses.
Ib.
6. *Same.—Adoption of Theory by Court.—Presumption that it will be Adhered to.—Effect of Presumption.*—Where the trial court, by sustaining the demurrer, held that such facts as were pleaded, even if proven, would not constitute a waiver, the presumption is that having by the ruling adopted such a theory it adhered to it throughout the case, and admitted no evidence, and made no finding relative to such alleged facts. It will be presumed, also, that whatever evidence, if any, the appellant may have had in support of this paragraph of reply it was not offered, and would, therefore, not appear in the record. The appellant had the right to assume that the court would adhere to the theory indicated by its ruling in sustaining the demurrer. Under this state of facts the Supreme Court will not look to the finding of facts by the court and to the conclusions of law for assurance that there was no waiver of the forfeiture.
Ib.

7. *Action on Policy.—Sufficiency of Complaint After Verdict.—Averment as to Ownership.—Performance of Condition.*—In an action on a policy of fire insurance, where the sufficiency of the complaint is not challenged until after the verdict has been returned, an allegation in the complaint that the plaintiff was the owner of the property at the time of its destruction by fire, is a sufficient allegation that he was the owner in fee of the real estate and the absolute owner of the personal property. Where the complaint alleged in detail a performance of the condition resting upon the assured, a general allegation of the performance was unnecessary. *Phoenix Ins. Co. v. Wilson, 449*
8. *Same.—Complaint.—Averment Concerning Proof of Loss.*—An allegation that the second day after the fire the plaintiff gave notice thereof in writing to the company at its office as by the policy provided, is sufficient after verdict to show that proofs of loss were duly furnished. *Ib.*
9. *Same.—Interrogatories in Application.—Answers to.—Age and Value of Building.—Expression of Opinion.*—Where by the terms of a policy of fire insurance answers to interrogatories in the application are made warranties, answers as to the age and value of the building insured will be regarded as mere expressions of opinion. *Ib.*

INTERLOCUTORY ORDER.

See INJUNCTION, 2.

INTERROGATORIES TO JURY.

1. *Dividing Interrogatory.—Party Complaining Must Affirmatively Show that he is Injured Thereby.*—Where the claim is made that the court erred in dividing an interrogatory asked by a party, and in submitting it to the jury as two interrogatories, it must affirmatively appear from the record that the party complaining of this action of the court was thereby injured. *British-American, etc., Co. v. Wilson, 278*
 2. *Same.—Antagonism, Degree of, How Must Appear.*—The antagonism between the special findings and the general verdict must be apparent on the face of the record beyond the possibility of being removed by any evidence legitimately admissible under the issues. *Ib.*
 3. *Same.—Evidence Can Not Be Considered.*—In passing upon the antagonism between the general verdict and the interrogatories, the evidence can not be considered. *Ib.*
 4. *Same.—Presumption in Aid of.*—No presumption in aid of the answers to interrogatories will be indulged in by the court on a motion for judgment on such interrogatories, all reasonable presumptions and intendments being against them. *Ib.*
 5. *Motion to Recommit.—How Brought into the Record.—Appeal.*—A motion to recommit interrogatories to a jury for more specific answers must be brought into the record by transcription, and not by mere recitals of the clerk, or it can not be considered on appeal. *Louisville, etc., R. W. Co. v. Shanks, 395*
 6. *Must Not Involve a Question of Law.*—In connection with other interrogatories which were submitted to the jury, the court refused to submit the following: "11. Q. If plaintiff did not look to see where she was stepping when she alighted, what reason or excuse was there for her not doing so? 12. Q. If you answer question eleven affirmatively, if there was any other reason or excuse, state fully what it was."
- Held*, that an answer to these interrogatories would necessarily have involved a question of law, which can not be submitted to a jury by interrogatories. *Ohio, etc., Co. v. Stanberry, 533*

JUDGMENT.

See CHANGE OF VENUE; DRAINAGE, 2, 3, 5, 6; PRACTICE, 6, 13; STATUTE OF LIMITATIONS, 2.

1. *Nunc pro Tunc Entry*.—*When May be Made*.—A *nunc pro tunc* entry may be made if there is any entry or memoranda found among the records of the case required by law to be kept, showing action taken, or orders made by the court, which the clerk has failed to record.
Perkins v. Haywood, 95
2. *Harmless Erroneous Instruction*.—A judgment will not be reversed on account of an erroneous instruction which does not injuriously affect the rights of the party complaining.
Haxton v. McClaren, 235
3. *Assumption of Mortgage Indebtedness*.—*Sufficiency of Cross-Complaint*.—Where in a suit to foreclose the lien of certain ditch taxes, certain of the defendants appeared and filed a cross-complaint against the plaintiff and two of their co-defendants on certain notes secured by mortgage and recovered judgment by default against one of the defendants to the cross-complaint, on the ground that he had assumed to pay the mortgage indebtedness as a part of the purchase-price of the real estate, the averments in the cross-complaint that said defendant purchased the mortgaged property, agreeing to assume the indebtedness thereon as part of the purchase-price, and that he had failed to pay any part thereof, was sufficient to authorize the rendition of a personal judgment against him.
Lowe v. Hamilton, 406
4. *Same*.—*Default*.—*Relief Against*.—*Inadvertence and Excusable Neglect*.—*Insufficiency of Showing*.—In an action by said defendant to be relieved from said judgment, on the ground that it had been taken against him through his mistake, inadvertence and excusable neglect, the fact that the process served in the action was not distinctly read to him, and that he was told by the sheriff, and by his attorneys, that he need not appear, when he furnished no excuse for not reading the process himself, and did not show that his attorneys had been informed of the facts of the case, would not entitle him to such relief.
Ib.
5. *Defendant Entitled to on General Denial*.—Where there was no evidence introduced entitling the plaintiff to recover, the defendant is entitled to a finding and judgment on the issue joined by his answer in general denial, and it matters not whether the evidence supports his affirmative answers or not.
Nat'l Bank v. Lock, 424
6. *Finding in Specific Sum*.—The finding of the court for the plaintiff in a specific sum is not objectionable, as the specific amount is essential to enable the plaintiff to collect the money.
New York, etc., R. R. Co. v. Hammond, 475
7. *Impeachment of*.—*Mental Incapacity of Party*.—*What Must be Alleged*.—One who seeks to impeach a judgment upon the ground of mental incapacity must directly state material facts, showing the existence of such mental incapacity at the date of the rendition of the judgment.
Van Walters, Matter of, v. Board, etc., 567
8. *Complaint*.—*Defective Paragraph*.—*Overruling Demurrer to*.—*When not Available Error*.—Where a demurrer should have been sustained to a paragraph of complaint, there is no available error, if it is apparent from the record that the judgment rests upon a good paragraph or paragraphs of the complaint, for the court can see from the record that no harm was done the complaining party.
Hill v. Pollard, 538

JURISDICTION.

See APPELLATE COURT.

1. *Justices of the Peace*.—*Killing of Stock*.—*Railroad*.—*Summons*.—*Service*.—

In an action before a justice of the peace against a railroad company to recover damages for the killing of stock, it is not essential in order to confer jurisdiction upon the justice that the return of the constable (the writ having been served upon a conductor of the company) shall show that he made the service within his own county. Where the person or individual served resides within the county, or, like conductors of railways, are constantly passing through it, the presumption will be entertained, in the absence of a showing to the contrary, that the officer did not depart from the limits of his jurisdiction.

Baltimore, etc., R. R. Co. v. Brant, 37

2. *Collateral Attack.—When Must be Made.—Direct Attack.—When too Late.*—Where the court has jurisdiction of the subject-matter, and objection is made to its jurisdiction over a particular case, the objection must be promptly made, and comes too late after the parties pursue the case to final judgment in the court of last resort without raising the jurisdictional question, and raise it for the first time when the judgment of affirmance by the Supreme Court is spread on the records of the circuit court. After such a delay, the question of jurisdiction could not be raised, even in a direct attack on the judgment.

Perkins v. Haywood, 96

JURY.

See GRAVEL ROADS, 11.

JUSTICE OF THE PEACE.

See JURISDICTION, 1; MUNICIPAL CORPORATIONS, 1.

LARCENY.

See CRIMINAL LAW, 20, 23.

LEGISLATURE.

See CONSTITUTIONAL LAW.

LEVY.

What Constitutes a Valid Levy Upon Personal Property.—When Outer Door May be Broken.—To constitute a valid levy upon personal property, the act of taking possession must be of such a character as would make the officer, if not protected by the process, liable for trespass. When possession is taken in obedience to a writ, and in its partial execution, the officer may, upon his return to complete his levy, if necessary, break open the outer door. *State, ex rel., v. Beckner, 371*

LICENSE.

See MUNICIPAL CORPORATIONS.

Power of Revocation.—Estoppel.—A mere permission to occupy land is a license, which may be revoked by the licensor or his grantee, unless some act is done which operates by way of estoppel to make the license irrevocable. *Lake Erie, etc., R. W. Co. v. Kennedy, 274*

LIEN.

See MECHANIC'S LIEN.

LIFE-ESTATE.

See DESCENTS.

LIGHT.

See MUNICIPAL CORPORATIONS, 3 to 7.

MARINE INSURANCE.

1. *General Average, When Allowed.*—To constitute a case for general average under a marine insurance policy, it must be shown that the ship and cargo were placed in a common imminent peril, that there was

a voluntary sacrifice of property to avert that peril, and that by that sacrifice the safety of the other property was presently and successfully attained. *British-American, etc., Co. v. Wilson, 278*

2. *Same.—Facts Sufficient to Show Case for General Average.—Overturning General Verdict by Interrogatories.*—Therefore, an answer of the jury to an interrogatory showing only that there was a sacrifice of property to relieve the property saved from a danger of navigation, and for the best interest of the property at risk, is not sufficient to overturn a general verdict for the insured. *Id.*

MARRIED WOMAN.

See ESTOPPEL.

Interest of in Husband's Lands.—When Divested by Judgment.—A judgment rendered against a married woman and her husband, quieting the title to land owned by the husband during coverture, but which prior to the action he alone conveyed, is binding on the wife after the husband's death, and prevents her from recovering the interest in the property given by section 2491, R. S. 1881. *Curren v. Driser, 33 Ind. 480, overruled.* *Tanguay v. O'Connell, 62*

MASTER AND SERVANT.

See RAILROAD, 21.

1. *Liability of Employer for Injury of Employee by Co-Employee.*—Where laborers are engaged together at the same place in a work that requires co-operation, and for the furtherance of a common purpose, and so associated as to bring them in frequent contact with each other, they are co-laborers, and the employer can not be held liable for an injury to one employee by the negligence of a co-employee. *Bier v. Jeffersonville, etc., R. R. Co., 78*
2. *Duty of Employer.*—It is the duty of an employer to provide a safe working place and appliances for his employee, but he is not an insurer. *O'Neal v. Chicago, etc., R. W. Co., 110*
3. *Defective Machinery.—Proof of Custom.*—Ordinarily a master will not be permitted to show as a defence to an action by an employee for not furnishing reasonably safe and suitable machinery, or a reasonably safe place for his employees to work, that it was the general or universal custom of other masters to furnish defective implements or an unsafe place to work. *Lake Erie, etc., R. R. Co. v. Mugg, 168*
4. *Safety of Place of Employment.—Duty of Master.—Assumption of Risk by Employee.—Contributory Negligence.*—A master is bound to take ordinary and reasonable care not to subject his servant to unreasonable and extraordinary dangers by sending him to work in dangerous buildings or premises. If he fails in his duty in this respect, by reason of which the servant is injured, such servant has a right of action against him, provided the injury occurred without the fault or negligence of the servant, and provided, further, that the risk of injury was not voluntarily assumed by the servant, with full knowledge of the danger, or competent means of such knowledge. For a state of facts showing a right of action in the plaintiff under this rule, see opinion. *W. C. DePauw Co. v. Stubblefield, 182*

MEASURE OF DAMAGES.

See RAILROAD, 20.

MECHANIC'S LIEN.

1. *Action by Material Man.—Contractor Not a Necessary Party.*—The contractor is not a necessary party in an action by a material man to foreclose a mechanic's lien. *Hubbard v. Moore, 178*

2. *Same.—Filing of Lien.—Sufficiency of Complaint After Judgment.*—In an action to foreclose a mechanic's lien when the dates of the items in the bill of particulars show that some of the materials were furnished less than sixty days before the notice of the lien was filed, and the complaint contains a distinct averment that the notice was filed in less than sixty days after said materials were furnished, the complaint is sufficient after judgment. *Ib.*
3. *Same.—Notice.—Materials Furnished After.—Lien.*—Under section 1692 Elliott's Supplement, a mechanic's lien can only be acquired for such materials as are furnished after the giving of such notice. *Ib.*
4. *Action to Foreclose.—What Notice Must Contain.—Notice to Owner Must be Proved.—Averment as to Notice in Complaint.*—Where material is furnished to a contractor, the notice of an intention to acquire a mechanic's lien, given under section 1690, Elliott's Supp. (Acts 1883, p. 141), need not contain a recital showing that notice had also been given to the owner in accordance with section 5 of said act. In an action to foreclose the lien, however, it must be averred in the complaint and proved on the trial that such notice was given. *Adams v. Shaffer, 331*
5. *Same.—Notice With Endorsement.—Admissible in Evidence.*—It was not error to admit in evidence the original notice with the endorsement made upon it by the recorder, showing that it was filed with him for record, and the time of such filing. *Ib.*
6. *Same.—Recording of Notice in Wrong Record.—Evidence.—Harmless Error.*—While the notice of an intention to acquire a mechanic's lien is required to be recorded in the "Miscellaneous Record," and it was erroneous to admit in evidence an entry in what was denominated the "Mechanic's Lien Record" of the county, showing the record of the notice, still it was harmless error, as the controversy being between the immediate parties, and no question as to innocent third parties being involved, the lien was acquired by the filing of the notice and was not affected by the failure of the recorder to record it in the "Miscellaneous Record," or by his mistake in recording it in the "Mechanic's Lien Record," a record not known to the law. *Ib.*
7. *Agreement not to File Notice.—Violation of.—Cross-Complaint.—Nominal Damages.—Sustaining Demurrer.—Harmless Error.*—In an action against a contractor, who had purchased the material, and the owner of the property, to enforce a mechanic's lien and recover the amount of the claim, the contractor filed a cross-complaint claiming damages for a breach of contract on the part of the plaintiff in filing the notice of mechanic's lien. The cross-complaint does not state in what manner or to what extent the contractor was injured. There was a prayer for \$500 damages. To this cross-complaint a demurrer was sustained. *Held*, that as there was no averment that the contractor was damaged in any sum, the prayer for damages could not supply such deficiency. *Held*, also, that if the cross-complaint was good, the sustaining of the demurrer thereto would not amount to reversible error, since if any damages were recoverable under the cross-complaint they would only be nominal, and a wrong ruling is only available error when it does harm to the substantial rights of the complaining party. *Reid v. Johnson, 416*
8. *Failure to Give Notice to Owner.—Special Finding of Facts.*—In an action by a material man to foreclose a mechanic's lien, the materials having been furnished at a time when it was necessary to give notice to the owner in order to acquire a lien, the burden was on the plaintiff to establish the fact of notice, and the failure of the court in its special finding of facts to find upon that point was equivalent to a finding against the plaintiff. *Young v. Berger, 530*
9. *Same.*—When the court, instead of finding that either notice was or

was not given, made a finding containing recitals of a portion of the evidence, with certain evidentiary facts, all bearing upon the question of notice, but made no finding whatever as to the fact itself, the finding must be regarded as against the plaintiff upon that subject. *Id.*

10. *Same.—Practice.—Special Finding not Sustained by Sufficient Evidence.*—In order to present the question raised by the failure of the court to find on the fact of the notice, it was proper for the appellant to move for a new trial on the ground that the special finding was not sustained by sufficient evidence and was contrary to the evidence. *Id.*

MISCONDUCT OF COUNSEL.

See CRIMINAL LAW, 25.

MISJOINDER OF COUNTS.

See CRIMINAL LAW, 20.

MISTAKE.

See WILL, 4.

MONEY HAD AND RECEIVED.

See PLEADING, 1.

MORTGAGE.

See SPECIFIC PERFORMANCE, 1.

1. *Foreclosure of.—Judgment Creditors.—Redemption by.—Second Sale by Mortgagee.*—The plaintiff's assignors held two judgments against one W., which were liens on land of W., on which the defendant had a mortgage. She obtained a judgment and foreclosure of her mortgage. The land was sold and she became the purchaser. In a suit to redeem by plaintiff's assignors it was held that as against one of their judgments only part of defendants' judgment had a prior lien, and they were permitted to redeem for a much less amount than the full amount of her judgment.

Held, that as against the plaintiff's defendant might thereafter have foreclosure for the unsatisfied part of her judgment subject to plaintiffs' first judgment and the amount paid to redeem from defendant.

Ewing v. Bratton, 345

2. *School Fund.—Satisfaction of by Auditor Without Payment to Treasurer.—Purchaser in Good Faith.*—Where the amount due on a school fund mortgage was paid to the county auditor, who appropriated the same to his own use, and never paid any part of the same into the treasury of the county, a purchaser, in good faith, of the land, who paid full value therefor without any knowledge whatever that the loan had not in fact been paid, had a right to rely upon the satisfaction of said mortgage as it appeared in the recorder's office, without an examination of the offices of the treasurer and auditor. Finding the school fund mortgage satisfied by the proper county officers, the only persons who could satisfy the same, the purchaser had the right to presume, without looking further, that the county auditor had proceeded regularly, and that the mortgage debt had in fact been paid to the county treasurer before said satisfaction was entered.

Slaughter v. State, ex rel., 465

3. *Action to Foreclose by Junior Mortgagee.—Senior Mortgagee Made Party.—When not Barred by Judgment.*—Where the holder of a senior mortgage was made a party defendant to an action brought by a junior mortgagee to foreclose his mortgage, and the complaint only called in question such liens as had accrued since the mortgage in suit was executed, the judgment therein that the mortgage sued on was the prior lien on the premises would not bar the right of the senior

mortgagee, who simply filed a general denial and allowed judgment to be taken against him by default to have his mortgage subsequently foreclosed. *English v. Aldrich, 500*

4. *Same.—When Senior Mortgagee Barred by Judgment.*—Where the holder of a junior mortgage instituted an action to foreclose the same and made a senior mortgagee a party defendant to the action, and the complaint alleged that the several defendants had or claimed to have some interest in or lien upon said mortgaged premises, "but if any such interest, lien or claim exists in behalf of them, or either or any of them, it is junior and subordinate to the lien of said mortgage," and the senior mortgagee failed to plead his prior mortgage, and the mortgage sued on was held to be senior to any lien held by any of the defendants, the judgment estopped the senior mortgagee from subsequently asserting his right under his mortgage. *Ib.*
5. *Same.—When Equity Will not Relieve Against Judgment.*—Where in the latter case the counsel for the senior mortgagee were informed by a clerk in the office of plaintiff's attorney that he was made a party to the foreclosure suit in order to bar his equity of redemption under a judgment for costs he held, and for no other purpose, the appellant had no right to rely upon such statement as against the allegations in the complaint against him, and the facts do not make a case calling for the exercise of the inherent power of a court of equity to set aside a judgment obtained by fraud or rendered through the mistake of the court. Such power will only be exercised when the party asking it is without fault, and where he proceeds without unreasonable delay after discovery of the fraud or mistake. *Ib.*

MUNICIPAL CORPORATIONS.

1. *Validity of Penal Ordinance.—Justice of the Peace.—Appeal to Supreme Court.*—Where a party was prosecuted before a justice of the peace for the violation of a penal ordinance of a town, the amount demanded being twenty dollars, and the only question involved being the guilt or innocence of the accused, there is no right of appeal, on the part of the town, to the Supreme Court, under section 632, R. S. 1881. The failure to convict the accused left the ordinance unaffected by the litigation, so that the validity of the ordinance upon which the prosecution was based was not in question. *Town of North Manchester v. Oustal, 8*
2. *Councilman Moving into Another Ward.—Vacation of Office.*—Where a councilman is elected from a certain ward in a city, and after his election he moves into and becomes a resident of another ward, he does not by such action vacate his said office, for he is not an officer of the ward from which he was elected, but an officer of the entire city. The statute only provides that he shall be a resident of the ward at the time of his election. *State, ex rel., v. Craig, 54*
3. *Ordinance Providing for Supply of Gas.—Construction of.—Exclusive Privilege.*—The defendant passed an ordinance granting to the plaintiffs' assignors, for a period of twenty-five years, the privilege of laying gas mains, to supply gas for illuminating purposes, along certain streets of the city. It was provided that the defendant should maintain a certain number of lamp-posts, and such additional lamp-posts and lamps along said mains as the city council might from time to time direct. It was further provided that, upon the erection of said lamps, the city should take sufficient gas from the company to keep the said lamps lighted, and should pay at the rate of three dollars per month for each and every lamp. Afterwards an extension of the mains was ordered, and the plaintiff submitted a proposition concerning the use and payment of the additional lamps to be provided. The proposition was accepted by the common council, with the stipu-

lation "that it be in force no longer time than the original contract." This subsequent arrangement was referred to as a contract in a number of resolutions passed by the common council in ordering the extension of mains.

Held, that although no definite time was mentioned in the ordinance during which the defendant was obligated to take gas for lighting its street lamps, the interpretation of the ordinance by the ordinary rules of construction and the acts of the parties thereunder, show that, by the ordinance, the city contracted to pay for twenty-five years for the gas furnished by the lamps provided for therein and by those afterward erected.

Held, also, that the ordinance did not grant an exclusive use of the streets, and that a monopoly was not given for supplying the city with gas for street lighting purposes.

Held, also, that the contract was not void on account of any supposed surrender by the common council of its legislative power.

City of Vincennes v. Citizens', etc., Co., 114

4. **Same.—Right to Contract for Supply of Gas.—What Period not Considered Unreasonable.**—A city has the power to contract for a supply of gas or water for a period extending beyond the tenure of office of the individual members of the common council making such contract. It can not be said that twenty-five years is an unreasonable time for which to contract for a supply of light or water. *Ib.*

5. **Same.—Act of March 3d, 1883, Construed.**—The act of March 3d, 1883 (Elliott's Supp., section 794), authorizing the common councils of cities to contract for light for its streets and alleys for a period of time not exceeding ten years, does not affect the contract sued on. By the fourth section of the act, existing contracts, except such as confer exclusive privileges, are declared to be valid. The contract involved did not confer exclusive privileges, and it is therefore not affected by said act. *Ib.*

6. **Same.—Pleading.—Answer.—Conflict of Ordinances.**—In an action brought by the plaintiff to recover for gas supplied to the defendant for public street lighting, under said ordinance, a demurrer was properly sustained to a paragraph of answer which alleged that, at the time of the said ordinance, an ordinance of the defendant was in force which required that proposals for work, the estimated cost of which should exceed \$40, should be let to the lowest bidder after a notice for proposals had been given by publication, and that the ordinance in suit was passed in violation of this ordinance. The ordinance claimed to have been violated evidently referred to work done for the city, and not to contracts such as the one in suit. If the passage of the ordinance sued on was within the prohibition of the other ordinance, its passage repealed it *pro tanto*. *Ib.*

7. **Same.—Answer.—Attempted Partial Annulment of Contract.**—A paragraph of answer was also bad which alleged that the common council, by resolution, prohibited the plaintiff from supplying gas after a certain date for ten of the lamp-posts specified in the complaint. The contract was mutually binding upon both the contracting parties, and neither could by its own act, prejudice the position of the other. *Ib.*

8. **Incorporation of.—Judicial Notice Taken of.**—Judicial notice will be taken by the courts that a city is incorporated under the general laws of the State. *Pennsylvania Co. v. Horton, 189*

9. **Power to Issue Bonds.**—A town can not, under the Constitution of this State, issue bonds to obtain funds with which to rebuild a school-house, when the issuance of the bonds will create a debt in excess of two per centum of the taxable value of the property within the corporate limits of the town. *Town of Winamac v. Huddleston, 217*

10. *Same.—Enjoining Issuance of Bonds.*—A taxpayer may maintain an injunction to prevent the issuance of corporate bonds without authority. *Ib.*
11. *Wrongful Appropriation of Land for Streets.—Liability for Tort.*—Where a city wrongfully took possession of the plaintiff's land and permanently appropriated and used it for a street, it is liable as a tortfeasor for taking possession of private property without complying with the charter under which it is incorporated.
City of Fort Wayne v. Hamilton, 487
12. *Same.—Permanent Injury.—Measure of Damages.—Mode of Computing.*—Where the injury complained of is permanent, and the complaint recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to succeed to the plaintiff's title to the property, damages may be assessed upon the basis of its value. In arriving at the amount of damages, it was proper for the jury to deduct the value of the property with the improvement from its value without the improvement. *Ib.*
13. *Same.—Loss of Benefits.*—If the city lost the benefit of having the benefits to other land-holders on account of the opening of the street assessed against them, it was the result of its own failure to proceed according to law, and in no way chargeable to plaintiffs. *Ib.*
14. *Same.—Statute of Limitations.—Other Action Pending.*—Where the regularity of the proceedings for condemnation, as well as the amount of the damages, was involved in an appeal to the circuit court, and the present action for injuries was instituted within two years after the termination of said action, it was instituted in season, as the plaintiffs could not have instituted their suit for injuries until the termination of the other action. A cause of action can not be said to have accrued until such time as the plaintiff can legally institute his action for relief. *Ib.*
15. *Right to Alienate Property.—Limitation of.*—A municipal corporation possesses the implied right to alienate its property, real or personal, of a private nature, unless restrained by charter or statute, but it can not dispose of property of a public nature, in violation of the trust upon which it is held. There is a distinction between property purchased for a public use, and not yet dedicated, and property purchased for that purpose and actually dedicated to that use. A deed which vests title to property in a municipal corporation may be of such a character as to dedicate the property to a public use, and where a deed vests the title to property in fee simple in the municipal corporation without limitation or restriction as to its alienation, the corporation has the right, any time before it is dedicated to a public use, to dispose of the property.
City of Fort Wayne v. Lake Shore, etc., R. W. Co., 558
16. *Same.—Deed by to a Railroad Company.—Reservation in.*—Where a city, in making a deed to a railroad company, reserved the right to cross the tracks of the company with its streets and alleys when the city should make an addition of certain land, such reservation will not operate in favor of the corporation until it has made such addition. A reservation in a deed can not be extended beyond its terms. *Ib.*
17. *Ordinance.—Use of Streets.—Grant to a Particular Company.—License.*—An ordinance which specifically and by name grants to a company (in this instance a natural gas company) the right to use its streets, etc., for the purpose of laying its pipes, etc., simply grants a license or permission to the particular company to use the streets for the purpose designated, and does not grant a special and exclusive franchise to the company to occupy and use the streets of the city for said purpose.
City of Rushville v. Rushville, etc., Co., 576

18. *Same.—Ordinance.—Taking Effect in Future.*—The fact that part of the provisions of an ordinance was not to take effect until a date designated in the future, would not affect either the validity of the entire ordinance nor of the particular provisions. *Ib.*
19. *Same.—Natural Gas.—Maximum Rate to be Charged.—City May Prescribe.*—Under the act of March 7th, 1887 (Acts 1887, p. 36), municipal corporations have the authority to regulate the supply, distribution and consumption of natural gas, including the fixing of maximum rates to be charged therefor. *Ib.*
20. *Same.—Act of March 7th, 1887 (Acts 1887, p. 36), Construed.—Scope of.—Title of Act.*—If the body of an act is ambiguous or doubtful, reference may be had to its title to aid in ascertaining the legislative intent. A reference to the title of the act above referred to shows that it was the purpose of the Legislature to empower a municipality with authority to do more than merely require the payment of a license fee by persons and corporations to whom it granted the privilege of using its streets and alleys for the distribution of natural gas therein. It was evidently the legislative purpose to confer upon the municipality the power to fix the maximum rate to be charged as a part of its power to regulate the supply, consumption and distribution of natural gas within its limits. *Ib.*
21. *Same.—Maximum Rates.—Right to Fix by Subsequent Ordinance.—Reserved Power of City.*—Where the ordinance under which the plaintiff company was operating contained nothing whatever on the subject of rates, the city had the right to pass a subsequent ordinance fixing maximum rates to be charged consumers, which should apply as well to the plaintiff company as to others. The plaintiff company in accepting its franchise and in entering upon its work without exacting a stipulation reserving to itself the power to fix its own charges or otherwise contracting for a restraint of the powers of the city, acted in full view of the reserved power of the city, under the statute, to establish maximum charges by which it should be governed. *Ib.*
22. *Same.—Supplying Natural Gas a Public Work.—Delegation of Control Over to City.*—The work of supplying natural gas to cities is a public one, for which property may be appropriated under the right of eminent domain. Property thus employed is devoted to a public use, and is subject to control and regulation by the State, and the State may delegate such control in whole or in part to municipal corporations in so far as relates to property thus devoted to such use within their limits. The right of control thus possessed, and which may be so delegated, includes the power to fix reasonable maximum rates that may be charged by the holder of the franchise, unless the State or the municipality is restrained by some provision in the charter or grant of the license which amounts to a contract. *Ib.*
23. *Same.—Furnishing Gas to all Consumers.—Ordinance May Require.*—A provision in an ordinance requiring any corporation, company, firm or individual accepting the provisions of the ordinance, to furnish gas to all consumers along the line of mains whenever applied for, is valid. *Ib.*
24. *Same.—Filing of Bond.—Subsequent Ordinance Requiring.—Invalidity of as to Plaintiff Company.*—Where the plaintiff company received its franchise under an ordinance which did not require the filing of a bond on its part, it could not be required to file a bond (the execution of the bond was of itself made a full acceptance of the new ordinance, with all of its requirements) in compliance with a provision to that effect contained in a later ordinance. • *Ib.*
25. *Same.—Relief by Injunction.*—Where the employees in charge of the work of the plaintiff company were arrested, prosecuted and fined for

the refusal of the company to file such bond, and further prosecutions were threatened if the refusal was persisted in, the plaintiff company had the right to go into a court of equity and have the enforcement of the bond provision of the later ordinance against it stayed by injunction.

COFFEY, J., dissents to so much of the opinion as holds that the statute therein set out confers the right to regulate the price at which natural gas shall be furnished. *Ib.*

MUNICIPAL BONDS.

See MUNICIPAL CORPORATIONS, 9, 10.

MURDER.

See CRIMINAL LAW, 13 to 19.

NATURAL GAS.

See INJUNCTION; MUNICIPAL CORPORATIONS, 17, 19 to 23.

NEGLIGENCE.

See COUNTY.

1. *Contributory.*—*When Proper to Submit Question of to Jury.*—When a state of facts and circumstances exists from which one sensible impartial man would infer that proper care had not been used, and that negligence existed, while another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence, the question of negligence must be referred to the jury under proper instructions from the court.

W. C. DePauw Co. v. Stubblefield, 182

2. *Contributory.*—*Action Under Apprehension of Sudden Danger.*—One who does an act under an impulse, or upon a belief created by a sudden danger, attributable to another's negligence, is not to be regarded as guilty of contributory fault, even though the act be regarded as a negligent one, if performed under circumstances not indicating sudden peril.

Clarke v. Pennsylvania Co., 199

NEW TRIAL.

See PRACTICE, 1.

NON EST FACTUM.

See EVIDENCE, 9.

NOTICE.

See APPEAL, 3; DRAINAGE, 3, 4; GRAVEL ROADS, 12; MECHANIC'S LIEN, 4 to 10; TAXES, 4.

NUNC PRO TUNC ENTRY.

See DRAINAGE, 5; JUDGMENT, 1.

OFFICE AND OFFICER.

Public Officers.—*Acting Within Scope of Duty.*—*State Bound Thereby.*—The State, as well as municipal corporations, is bound by the acts of its officers, when they act within the scope of their authority.

Slaughter v. State, ex rel., 465

PARENT AND CHILD.

See BOARD OF CHILDREN'S GUARDIANS.

Contributory Negligence.—Parents of children of tender years must use care proportionate to known dangers, or dangers that might be known by the exercise of ordinary diligence.

Louisville, etc., R. W. Co. v. Shanks, 395

PARTIES.

See APPEAL, 1; ASSIGNMENT OF ERRORS; MECHANIC'S LIEN, 1, 14.

PARTITION.

See TRIAL BY JURY.

PARTNERSHIP.

Real Estate Purchased With Firm Assets.—Title Not Taken in Firm Name.—Liability of for Debts of Individual Partners.—Where payments were made out of firm property and funds upon the purchase or improvement of real estate not purchased or used for partnership purposes and title taken in the name of the individual partners or of others on their account, the sums so paid were, by the act of payment, withdrawn from the firm assets and the land so purchased is liable for the individual debts of a partner to the extent of his interest as between himself and a creditor. *Chandler v. Jessup, 351*

PERSONAL INJURIES.

See ACTION; RAILROAD, 1, 10, 18.

PLEADING.

See CONTRACT, 4; DECEDENTS' ESTATES, 2; DEED, 1; EJECTMENT; FRAUDULENT CONVEYANCE, 3, 4; FRAUDULENT REPRESENTATIONS; INJUNCTION, 3; INSURANCE, 2, 5, 8; MECHANIC'S LIEN, 2, 4; PROCEEDINGS SUPPLEMENTARY TO EXECUTION, 1; RAILROAD, 10, 15, 18.

1. *Insane Person.—Action by Guardian of.—Complaint.—Conversion of Money. Money Had and Received.*—In an action by the guardian of an insane person against the board of commissioners of a county, a paragraph of complaint is sufficient to withstand a demurrer which shows a wrongful taking by a person who was at the time treasurer of the county, of a large sum of money belonging to the plaintiff's ward, the placing of the same in the county treasury, and a retention and conversion of the money by the board of commissioners. A paragraph for money had and received is likewise good which alleges that the board of commissioners took, received and placed in the county treasury money of the plaintiff's ward (the insanity of the ward and the appointment of the plaintiff as guardian being alleged); that it has kept, and still keeps and retains said money, etc., and that the board of commissioners is indebted to the appellant in the sum so taken, with interest. *Hennel v. Board, etc., 32*
2. *Fraudulent Conveyance.—Complaint.—Averment as to Other Property.*—In an action by a creditor to set aside a voluntary conveyance, the complaint must allege that at the time of the conveyance the debtor had no other property subject to execution out of which the claim of the creditor could be satisfied. *Bright v. Bright, 66*
3. *Same.—Implied Trust.—What Complaint Must Aver to Establish.*—In an action to reach property conveyed by a father to his son, no valuable consideration having been paid for the same, and subject it to the satisfaction of a debt subsequently contracted, the complaint, in order to establish an implied trust, must state facts, in the absence of any allegation of fraud, showing that the land was conveyed to the son in trust for the use of the father. *Id.*
4. *Action for Damages.—Contributory Negligence.*—In an action for damages the complaint must allege that the plaintiff is without fault, or an equivalent averment, or the complaint will be fatally defective. *Bier v. Jeffersonville, etc., R. R. Co., 78*
5. *Complaint.—Specific Averments Control.—Corporation.*—Where a complaint charged that the defendant is the same corporation under a different name as the one that entered into a contract with the plaintiff.

iff, but the specific averments of the complaint showed that the defendant was a new corporation, the latter averments must control, and there can be no recovery upon the theory that the defendant corporation is the same as the one with which the plaintiff contracted.

Moyer v. Fort Wayne, etc., R. R. Co., 88

6. *Several Demurrer.*—A demurrer in the following language: "Come now the defendants and demur severally to each paragraph of the complaint as amended, because the same does not state facts sufficient to constitute a cause of action against defendants," must be regarded as a several demurrer addressed to each paragraph of the complaint.

Terre Haute, etc., R. R. Co. v. Sherwood, 129

7. *Filing of Supplemental Complaint.*—*Discretion of Court.*—A supplemental complaint is an additional complaint consisting of facts arising after the filing of the original, and it and the original constitute the complaint in the cause. It is largely within the discretion of the trial court to allow the filing of additional pleadings after the issues are closed.

Pouder v. State, 327

8. *How Construed.*—*Isolated Averments.*—A pleading must be construed in accordance with its general scope and tenor, regardless of isolated averments.

Miller v. Burket, 469

9. *Proceeding Upon Different Theories.*—*Right of Court to Choose.*—If a paragraph of complaint proceeds upon more than one theory, the court has the right to construe the paragraph as proceeding upon the theory most apparent and most clearly outlined by the facts stated and require the case to be tried upon one definite theory.

Batman v. Snoddy, 430

10. *How to be Construed.*—The nature of an action must be determined from the general character and scope of the pleading, disregarding isolated and detached allegations not essential to the support of its main theory, and must be construed as proceeding upon the theory which is most apparent and most clearly outlined by the facts stated. Such a construction should be given as will give full force and effect to all of its material allegations and as will afford the pleader full relief for all injuries stated in his pleading.

Monnett v. Turpie, 432

11. *Action on Written Instrument.*—*Failure to File Exhibit.*—*Demurrer.*—The statute which requires a copy of the original of an instrument of writing upon which a pleading is founded to be filed with the pleading, is imperative; and where the pleading avers that a copy is filed, but no copy is found in the record, the pleading is bad on demurrer.

Blackwell v. Pendergast, 550

POSSESSION.

See EJECTMENT.

PRACTICE.

See APPEAL; BILL OF EXCEPTIONS; EVIDENCE, 1 to 3, 14, 17; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; VERDICT.

1. *Appeal.*—*New Trial.*—*Amount of Recovery.*—In order to present a question on appeal, relating to the amount of the recovery, it must be assigned as a cause for a new trial.

City of Vincennes v. Citizens, etc., Co., 114

2. *Demurrer.*—*Overruling of to Bad Paragraph of Complaint.*—Where a demurrer is erroneously overruled to a bad paragraph of a complaint, and it is not affirmatively shown by the record that the judgment rests on the good paragraphs, a reversal must be adjudged.

Terre Haute, etc., R. R. Co. v. Sherwood, 129

3. *Affirmative Answer.*—*Refusal to Permit to File.*—*When not Error.*—Where the court refused to permit the defendant to file an affirmative an-

swer, after the issues had been closed, but all the matters set forth in the answer proposed to be filed were given in evidence and embraced in the verdict, it affirmatively appears that the defendant was not injured by the ruling.

Lake Erie, etc., R. R. Co. v. Mugg, 168

4. *Same.—Independent Paper Filed with Transcript.—Supreme Court will not Consider.*—A sworn copy of the opinion of the trial court, giving its reasons for overruling the motion for a new trial, taken down by a stenographer and filed as an independent paper with the transcript, will not be considered by the Supreme Court on appeal. *Ib.*
5. *Motion to Separate Causes of Action.—Demurrer for Misjoinder of Causes.*—A complaint was filed containing two paragraphs, the first charging the fraudulent taking of plaintiff's money and property and appropriating the same to the purchase of real estate, and taking the title to the same in the name of the defendant's wife, and praying for a judgment and that a lien be declared on the real estate; the second paragraph asked for a judgment for the money so appropriated. A motion was made to require the causes of action to be separated, which was overruled. A demurrer to the complaint on the ground of a misjoinder of causes of action was overruled.
Held, that the rulings of the court were harmless, and constituted no reversible error.
File v. Springel, 512
6. *Same.—Judgment.—Evidence Supporting.*—Where there is evidence tending to support the finding, the judgment will not be reversed. *Ib.*
7. *Same.—Evidence.—Harmless Error.*—If evidence is erroneously admitted, and it works no harm to the adverse party, it will not be a cause for reversal. *Ib.*
8. *Same.—Evidence.—Rebuttal.—What Competent.*—Where the defendants testified in relation to their property, it was not error to allow evidence to be introduced concerning an inventory of his property filed by one of the defendants asking exemption from sale on execution, also concerning a mortgage executed by defendants. *Ib.*
9. *Same.—Parol Evidence.—Contents of Record.*—Where one testified to having a mortgage, that he commenced foreclosure proceedings, and that he afterwards took a conveyance of the mortgaged property, paying a difference of sixty dollars to the mortgagors, it was not error to admit such evidence, as it was not proof of the contents of the record. *Ib.*
10. *Appeal to Supreme Court.—Amended Pleading.—Omitted From Record.—Demurrer to Complaint as a Whole.*—Where a complaint was filed in two paragraphs, and afterwards the second paragraph was amended, and the record contains said paragraph as originally filed but not as amended, a judgment overruling a demurrer, which alleged that the complaint failed to state a good cause of action will not be reversed even if the first paragraph of the complaint was bad, as such an assignment of error can only be made against the complaint as a whole.
Hutchings v. Hay, 369
11. *Same.—Evidence.*—The amended paragraph of complaint not being in the record, a question relating to the evidence sought to be presented by the motion for a new trial can not be considered. *Ib.*
12. *Argumentative Denial.—Overruling Demurrers to.*—Where a general denial is filed, and a second paragraph of answer is also filed, which is merely an argumentative denial, it is not error to overrule a demurrer to the second paragraph.
Matchett v. Cincinnati, etc., R. W. Co., 334
13. *Same.—Judgment Upon Answers to Interrogatories.—Appellate Court not Bound to Direct.*—An appellate tribunal is not bound to direct judgment upon answers to interrogatories, but may, when justice requires,

- remand, with instructions to award a *venire de novo* or grant a new trial. *Ib.*
14. *Admitting New Parties.*—When it is shown that the determination of a cause may seriously affect the rights of those not parties, it is proper, on a sufficient showing, to permit them to intervene and present their side of the controversy. *Parker v. State, ex rel., 419*
15. *Same.—Action Affecting the Public.—Calling in Attorney General.*—When the adjudication sought is such as will affect the general public, it is the duty of the court to take such additional steps as may be necessary to a full presentation of the questions involved, as, for example, calling in the Attorney General. *Ib.*
16. *Overruling Demurrer to Original Complaint.—Effect of Filing Amended Complaint.*—Where a demurrer was filed to a complaint and overruled, and exceptions were reserved, but afterwards, on leave of court, the complaint was amended, the amended complaint superseded the original complaint, and there is no longer any question in the record as to the sufficiency of the complaint at the time the demurrer was ruled upon. *Wabash, etc., R. W. Co. v. Morgan, 430*
17. *Same.—Examination of Party Out of Court.—Scope of Examination.*—Under sections 509 and 510, R. S. 1881, a party may be examined, as a witness, concerning any matter stated in the pleading, but he can not be compelled to testify as to the names of his witnesses and to state by whom he expects to prove this fact or the other. *Ib.*
18. *Same.—Amendment of Complaint.—When and How May be Made.*—The court has the right to allow a party to amend his complaint during the trial and after the evidence is closed, without requiring a showing supported by affidavit. *Ib.*
19. *Paragraph of Answer.—Striking Out.—Evidence Admissible Under General Denial.—Presumption.*—Where a paragraph of answer is stricken out and the evidence admissible under said paragraph was admissible under the general denial on file, it will be presumed that this was the ground upon which it was stricken out. *City of Fort Wayne v. Hamilton, 487*
20. *Answers to Interrogatories.—When Party May, Not Compel.*—Where a petitioner has no cause of action he has no right to compel answers to interrogatories. *Van Walters, Matter of, v. Board, etc., 567*

PRESUMPTION.

See CONTRACT, 5; CRIMINAL LAW, 22; INTERROGATORIES TO JURY, 4; PRACTICE, 19.

PRINCIPAL AND AGENT.

See CONTRACT, 6.

PRIORITY OF LIEN.

See MORTGAGE, 3 to 5; TAXES, 1.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

1. *Fund in Sheriff's Possession.—Wrongful Transfer by Him.—Supplemental Complaint Showing the Fact.—When May be Filed.*—Where proceedings supplementary to execution were instituted, and the fund which the plaintiff was endeavoring to reach had been paid into the hands of the sheriff, and the sheriff, without the consent of the plaintiff, and without any order of the court authorizing him to do so, transferred the fund to one of the parties to the suit who was insolvent, it was proper that the court should be informed of that fact by supplemental complaint, and it was not error for the court to permit the filing of such supplemental complaint after the evidence was introduced and
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while the court was holding the cause under advisement, it being averred that the plaintiff had no knowledge of the transfer of the fund until the day before the trial of the cause commenced.

Pouder v. State, 327

2. *Same.—Evidence.*—The payment of the fund by the sheriff to one of the parties to the suit without the order of the court, or the consent of the plaintiff, was wrongful, and it was proper to treat him as still in the custody of the fund, and to require him to pay the same to the appellee or his attorneys of record. Documentary evidence was admissible that tended to prove that the fund in question was held by the sheriff as the custodian of the court. *Ib.*

PROMISSORY NOTE.

1. *Signing of in Blank.—Negotiation of, Contrary to Instructions.*—Payor Bound Thereby.—Where a person signs his name to a blank note and intrusts it to another, he thereby gives such person authority to fill it up in any manner he pleases, not inconsistent with the character of such blank paper, and a party taking it will be protected, even if the express instructions of the payor were disobeyed, and the note used for another purpose than that for which it was intended. The fact that the party intrusted with the blank note also signed it as maker before negotiating it, will not relieve the party who originally signed the blank note. *Geddes v. Blackmore, 551*
2. *Same.—Notice of Violation of Instructions.—What is not.*—The fact that the payee of the note knew on the day he advanced the money thereon that the party who signed it in blank was in town, and he did not say anything to him about the loan, would not convey notice to the payee of the unauthorized use of the paper. *Ib.*
3. *Same.—Finding of Jury.—Conclusion from Other Facts Found.*—Where the jury found all the facts relating to the signing of the note, filling in of blanks, instructions, etc., and at the close of the verdict found that the defendant did not execute the note, the latter finding, being a mere conclusion drawn from the other facts found, will be disregarded. *Ib.*

PROOF OF LOSS.

See INSURANCE, 4, 8.

PUBLIC UTILITY.

See HIGHWAY, 1.

QUIETING TITLE.

See STATUTE OF LIMITATIONS, 4.

RAILROAD.

See CONTRACT, 2.

1. *Action for Personal Injuries.—Complaint.—Averments as to Contributory Negligence.*—In an action against a railroad company to recover damages for personal injuries, it must affirmatively appear from the averments of the complaint that the injured party himself was without fault. This may be by the simple, general averment that he was without fault, or there may be such a statement of facts without any such general averment as will be sufficient. *Fort Wayne, etc., R. R. Co. v. Gruff, 13*
2. *Same.—Foreign Car.—Duty of Employee to Inspect.*—If the employee of a railroad company is injured by reason of defects in a car transferred to said company by another railroad, and by the rules of the company known to said employee, it is his duty to inspect said car; he can not recover for injuries caused simply by his failure to make the inspection. *Ib.*

3. *Risks Assumed by Employees.—Contributory Negligence.—Duty of Employer.*—When a person enters into the employment of a railroad company, the employer is under no obligation to examine the employee as to his experience or fitness, unless said applicant be a child, and said employee assumes the risk of such perils as are incident to the same, and must exercise care proportionate to the danger of the service. The employee will be held to have knowledge of what is open and obvious, and to recover damages for an injury sustained he must be free from contributory negligence.

O'Neal v. Chicago, etc., R. W. Co., 110

4. *Action for Death of Employee.—Knowledge of Defective Rail.—Complaint.—Contributory Negligence.*—In an action against a railroad company for damages for the death of a switchman, a complaint is not demurrable on the ground that it shows the deceased to have been guilty of contributory negligence, when it avers that his death was occasioned by a defective rail, the defects consisting of a sliver which extended outward and along the outside of the rail; that while going to couple two cars, one of which was in motion, he stepped on the sliver and was held fast until run over by the moving car; that the injury was caused by the fault and negligence of the defendant, and that the deceased had no knowledge of the defective condition of the rail or existence of the sliver, and that the injury was caused without any fault or negligence on his part. The fact that he did not, while engaged in making the coupling, see the sliver, can not, of itself, raise a presumption of contributory negligence on his part; nor, as against the averments of want of knowledge on his part, can it be determined that he must have known, or should have known, of the defective condition of the track. *Lake Erie, etc., R. R. Co. v. Mugg, 168*
5. *Same.—Evidence.—Rules of the Company.*—In such action, it was not error for the court to refuse to permit the defendant to introduce in evidence certain rules and regulations of the company for the guidance of its employees in the discharge of their duties, no offer being made by the defendant to show a violation by the deceased of any of such rules. *Ib.*
6. *Same.—Proof that Deceased Gave His Wages to His Wife.*—It was not error to permit the plaintiff to prove that the deceased had been in the habit of turning his wages over to his wife, and permitting the same to be expended for the support of his family. This evidence was competent to show the loss sustained by his family because of his death. *Ib.*
7. *Same.—Experiments Made by Witness.—Exclusion of.*—Where evidence was given on the trial of statements made by the deceased, that at the time of the injury his boot froze to the rail, and he was unable to pull it away, the court properly refused to permit a witness to testify that, after the statements were made in his hearing, by the deceased, he experimented and found that the weather had the same effect on his boot, it not being shown that the experiment was made under the same conditions that existed when the injury took place. *Ib.*
8. *Same.—Expert Testimony.*—Where the defendant produced a witness, who gave expert evidence upon the result of an examination of the heel of the boot worn by the deceased at the time of the accident, it was proper for the court to permit the plaintiff to introduce a shoemaker as a witness in rebuttal on this question. *Ib.*
9. *Same.—Measure of Damages.—Loss of Support and Maintenance.*—The plaintiff was entitled to recover the damages suffered by the loss of the support and maintenance of the widow and minor children of the deceased, in addition to any prospective accumulation of property. *Ib.*

10. *Personal Injuries.—Complaint.—Averment as to Contributory Negligence.—Motion to Make More Specific.*—In an action against a railroad company to recover damages for a personal injury, a general averment that the injury happened without the fault or negligence of the plaintiff is sufficient. It is not necessary to set out affirmatively all the precautions taken to avoid the injury. If a more particular and definite statement of the facts was desired, the remedy was by motion to make the complaint more specific. For review of the evidence see close of the opinion. *Pennsylvania Co. v. Horton, 189*
11. *Same.—Rate of Speed.—Violation of City Ordinance.—Negligence per se.*—It is negligence *per se* to run a train of cars in violation of a city ordinance, and if any one is injured in consequence of such negligence without being himself guilty of contributory negligence, he may recover damages for such injury. *Ib.*
12. *Same.—Instructions to Jury.—Injury at Crossing.—Care to be Exercised by Plaintiff.*—In an action against a railroad company to recover damages for a personal injury, the defendant can not successfully complain of an instruction which informed the jury that "if safety under the circumstances required that he (plaintiff) should stop his horse to ascertain whether it was safe to cross the track or not, it was his duty to stop and look and listen, and if, failing in this, he was caught by the engine and injured, he can not recover." *Ib.*
13. *Same.*—An instruction in such an action that the plaintiff could not recover if "at the time of and just preceding the injury he could, by looking in the proper direction, have seen the train coming towards him in time to have avoided the injury," although no warning was given of its approach, and although the train was running in violation of a city ordinance, is not objectionable because of the omission of the element of listening, the same having been fully treated of in other instructions. *Ib.*
14. *Fellow-Servants.—"Section Boss" and Section Hand.*—A member of one "section gang" is a fellow-servant of the boss of another "section gang" employed by the same railroad company, they being engaged in the same general service and in the same line of duty, and he can not recover for an injury occasioned by the negligent running of the hand-car, in charge of said boss, into the hand-car on which the plaintiff was riding. *Clarke v. Pennsylvania Co., 199*
15. *Complaint Against.—Motion to Make More Specific.—What Facts Sufficient to Constitute a Passenger.—Exonerating Facts Must be Set Up in Defence.*—In an action against a railroad company, the complaint alleged that the defendant was a common carrier, etc., and at a certain date the plaintiff took passage and was admitted as a passenger in one of appellant's cars in one of its trains, to be carried from Medora, in Jackson county, to his home in Sparksville, both of said stations being on said defendant's road.
Held, that a motion to make the complaint more specific in alleging how and in what manner he was admitted as a passenger in one of appellant's cars, and whether he purchased a ticket, or was prevented therefrom, and, if so, how, or whether he paid or tendered his fare from the point of entrance to the point of destination, was properly overruled. The facts stated made him a passenger.
Held, also, that if any fact exists which exonerates the company from treating him as a passenger, it must be pleaded in defence.
Ohio, etc., R. W. Co. v. Craucher, 275
16. *Injury to Brakeman.—Defective Brake.—Contributory Negligence.—General Verdict.—Answers to Interrogatories.*—A brakeman instituted an action against a railroad company to recover damages for injuries alleged to have been occasioned by a defective brake. The complaint alleged

that the defect was unknown to the plaintiff, but that it was known to the defendant. The defendant claimed that under the rules of the company it was plaintiff's duty to inspect the brake; that the railroad company had no knowledge of the defect, nor means of knowledge, and that the plaintiff both had the means of knowledge, and was bound to know of the defective brake. A general verdict was returned for the plaintiff. The jury also returned answers to a number of interrogatories submitted to them.

Held, that the general verdict in favor of the plaintiff was in effect a finding that there was negligence on the part of defendant, and that the defect in the brake was not a risk assumed by the plaintiff as an incident to his employment, and that plaintiff had no knowledge of the defective brake.

Held, also, that the general verdict on these questions was conclusive, as the answers to interrogatories were not utterly irreconcilable therewith.

Matchett v. Cincinnati, etc., R. W. Co., 334

17. *Same.—Conflicting Answers to Interrogatories.—Effect of.*—Where the answer to one of the interrogatories stated that the defect in the brake could have been readily discovered by the plaintiff, and the answer to another interrogatory stated that it was not shown whether the defect could have been discovered had an examination been made, the answers neutralized each other, leaving the general verdict decisive that the plaintiff was free from contributory negligence. *Ib.*
18. *Personal Injuries.—Defective Engine.—Sufficiency of Complaint.*—In an action against a railroad company by an employee to recover damages for injuries alleged to have been sustained while coupling cars it was averred that the engine used was defective, and could not be handled or controlled so as to be safe for those engaged in coupling and uncoupling the cars which were propelled by it, such difficulty in handling and managing, being in part caused by the leaking of the throttle, and in part by defects unknown to plaintiff, and which he is unable to more particularly describe or specify, and that said defects combined were such that when said engine was reversed and caused to move backward it would often give a sudden spring or start, and would move with a sudden rush or spring. It was also alleged that the defendant knowingly employed an incompetent engineer to operate said engine. It was further alleged that the defendant had long known of the dangerous and defective condition of the engine.

Held, that a motion to make the complaint more specific in that the plaintiff should be required to state the length of time the engine had been defective, and the length of time the engineer had been negligent, the exact defects in the engine, the particulars which constituted the alleged incompetency of the engineer, etc., was properly overruled.

Wabash, etc., R. W. Co. v. Morgan, 430

19. *Same.—Interrogatory to Jury.—Notice of Defect.*—It was proper for the plaintiff to submit an interrogatory to the jury, asking if the foreman of the shop of the defendant, at the place where the accident occurred, was not notified before the accident by an engineer of the defective engine, that it was in an unsafe and unfit condition, and liable to be wrecked unless it was taken into the shops and repaired. *Ib.*
20. *Same.—Measure of Damages.—What Considered in Estimating.*—In estimating the damages in such an action, it was proper to inform the jury that they should be ascertained on the basis of compensation, and that in making such estimate the jury should take into consideration the plaintiff's physical and mental suffering, the character of the injury, whether temporary or permanent, and the reduction, if any, in plaintiff's ability to earn money caused by the injury. *Ib.*
21. *Same.—Master and Servant.—Safe Machinery.—Master's Obligation to Fur-*

nish.—While the master is not bound to use the highest care, nor to use the latest or most improved machinery, he is bound to use care, skill, and prudence in selecting and maintaining machinery and appliances, and for a negligent omission of this duty he is answerable to a servant injured by the omission. *Ib.*

22. *Same.—Instruction to Jury.—Notice of Defect.—How May be Inferred.*—An instruction to the jury as to notice on the part of the defendant of the defective engine, that they might find such notice to be proved, if it might be rightfully and reasonably inferred from the evidence given in the cause, although there might be no direct testimony as to such notice, was proper, in view of the averment in the complaint that the defendant had long known of the dangerous and defective condition of the engine. *Ib.*

23. *Same.—Instruction to Jury.—Incompetence of Engineer.*—An instruction was properly refused which made the plaintiff's right of recovery dependent upon the incompetence of the engineer, and the defendant's knowledge of such incompetence, as under the allegations of his complaint he might have recovered by reason of the defects in the engine. *Ib.*

24. *Same.—Instruction to Jury.—Failure to Use Safety Coupler.—When Immaterial.*—It was not error to refuse to instruct the jury that the plaintiff could not recover by reason of the fact that he was trying to make the coupling without the use of a safety coupler, which he was required to use by the rules of the company, where there was no evidence that the injury was caused or contributed to on account of a failure to use a safety coupler. *Ib.*

25. *Same.—Instruction to Jury.—Defining Duties of Yard-Master.*—An instruction was properly refused which stated, as a matter of law, what were the duties of a yard-master, in which capacity the plaintiff was acting at the time of the accident, and that his position was more favorable than that of the master to know the fitness of the engine and engineer. *Ib.*

26. *Same.—Instruction to Jury.—Latent Defects.—Duty of Employer and Employee Concerning.*—It was not error to instruct the jury that the plaintiff's duty was to furnish appliances free from latent defects, and that the duty to search for defects did not rest upon the employee. *Ib.*

27. *Same.—Instruction to Jury.—Opportunity of Plaintiff to Know.—Fitness of Engine.*—It was not error to refuse to instruct the jury that if the plaintiff had worked a certain number of days as yard-master with the engine claimed to be defective, and coupled and uncoupled cars during that time, and saw others do so, and did not object to continuing work, then as matter of law, he assumed the risk of injury. The instruction took from the jury the right to pass upon the opportunities the plaintiff had to ascertain the fitness of the engine, and stated, as a matter of law, what time the plaintiff would have to work with the engine to be conclusively presumed to have known of any defects existing in the engine. *Ib.*

28. *Same.—Evidence.*—It was proper for the plaintiff to testify what his duties were, if any, as to superintending or looking after the fitness or qualification of the engineer or the fitness of the engine. It was also proper to interrogate a witness as to other defects than the defect in the throttle valve, the complaint having alleged that there were other defects unknown to the plaintiff, but of which the defendant had knowledge. It was not proper, however, to ask an engineer, who was called upon to testify: "If the engine and engineer worked so as to be satisfactory to the yard-master, is there any occasion for complaint," or to ask a witness a question which necessitated a comparison of engines. *Ib.*

29. *Right of Way.—Condemnation Proceedings.—Awards.—Liability for by Those Succeeding to the Rights of the Corporation.*—Where the appellant had acquired the property, rights and franchises of a railroad corporation which had condemned land for a right of way, and the appellant entered upon, used and occupied the land for the purposes for which it was condemned, it must be held to have adopted the original appropriation, and having adopted and ratified such appropriation, it is bound in equity to compensate the owners for the land thus taken, and it is bound by the judgment in the condemnation proceedings against the corporation, through which it takes its title.
New York, etc., R. R. Co. v. Hammond, 475
30. *Defective Platform.—Use of by Passenger.—Degree of Care Necessary.*—In order to make a passenger using a platform guilty of contributory negligence, the defect must be such as would naturally suggest to one of common understanding that it was dangerous, and such as to place one in peril to pass over it. A passenger is not bound to that degree of inspection and care as a servant in the master's service.
Ohio, etc., R. W. Co. v. Stansberry, 533
31. *Right of Way.—Crossings.—Taking Longitudinally for a Highway.*—Railroad companies acquire the right to construct their tracks subject to the dominant right of the State to cross such tracks when the public necessity demands that new roads and streets shall be opened, but the right to take longitudinally is quite a different thing from the right to cross, and is governed by different rules. A municipal corporation, in the absence of legislation expressly or by necessary implication authorizing it, can not take a part of the right of way of a railroad company by constructing a public highway longitudinally to the right of way.
City of Fort Wayne v. Lake Shore, etc., R. W. Co., 558
32. *Same.—Right of Highway to Cross.—Limitation of.*—The rule that allows the construction of streets and other public highways across railroad tracks has its limitations. They can not be so constructed when by so doing the railroad company would be unable to use its track at the point of crossing for the purpose for which it was constructed. *Id.*

RAPE.

See CRIMINAL LAW, 3, 4.

REAL ESTATE.

See DIVORCE, 1; FRAUDULENT REPRESENTATIONS, GUARDIAN AND WARD; PARTNERSHIP; TRUST AND TRUSTEE, 1, 13.

Conveyance of.—Want of Consideration.—Parol Evidence Admissible.—When there is fraud or mistake in executing or securing the execution of a conveyance, for which no consideration is paid, parol evidence is admissible.
Ewing v. Smith, 205

REASONABLE DOUBT.

See CRIMINAL LAW, 5, 8.

REDEMPTION.

See MORTGAGE, 1.

REPAIRS.

See DRAINAGE, 8, 11.

REPLEVIN.

1. *Unlawful Levy by Constable.—Resistance by Householder.—Trespass.*—Where a constable, who had a writ of replevin for a sewing machine, went to the dwelling-house of a third person with whom the defendant in replevin was living, and stated to the householder that he had a writ for the machine of Mrs. S., and the same was pointed out to

him, but he went away, without taking possession of it, and he returned in the afternoon of the same day and forced open the outer door of the house, which the householder had partly opened, but which she was endeavoring to close when she ascertained who he was, the constable was guilty of a trespass, which rendered his subsequent acts unlawful, and justified the householder in resisting by force his further progress in serving the writ. *State, ex rel., v. Beckner, 371*

2. *Same.—Unlawful Acts of Constable.—Liability of Sureties on His Bond.*—The unlawful conduct of the constable took place in the discharge of his official duties, and not while he was acting merely by color of his office, and the sureties on his bond are liable for injuries sustained by the householder in attempting to prevent him from serving the writ. *Ib.*
3. *Same.—Breaking of Outer Door.—What will not Justify.*—The sewing machine being in the house of the relatrix without fraud, the shifting of the machine to another room after the constable's first visit, and the substitution of another machine in its place, would not in any manner authorize the officer to break the outer door, he necessarily being in ignorance of the change, and having the right when once lawfully admitted to break down inner doors in the discharge of his official duties. *Ib.*

REPORT OF VIEWERS.

See HIGHWAY.

RES GESTÆ.

See EVIDENCE, 5.

REVOCATION.

See LICENSE; TRUST AND TRUSTEE, 2.

RIGHT OF WAY.

See EASEMENT; RAILROAD, 29, 31.

SCHOOL FUND MORTGAGE.

See TAXES, 1.

SEDUCTION.

See CRIMINAL LAW, 7.

SPECIAL FINDINGS.

See MECHANIC'S LIEN, 8; TRUST AND TRUSTEE.

Must State Facts not Evidence.—In a special finding, mere statements of matter of evidence are out of place and can not be considered in this court. It is the duty of the trial court to determine what the evidence proves and state its judgment or conclusions as to the fact.

Parks v. Satterthwaite, 411

SPECIAL VERDICT.

See GRAVEL ROAD, 6, 8.

SPECIFIC PERFORMANCE.

1. *Mortgage Securing Bonds.—Agreement to Convey in Satisfaction of.*—A. contracted to convey to the City of Indianapolis certain lots, to "be perfect and free from liens and encumbrances," except a certain mortgage securing \$60,000 of bonds and the interest coupons thereto attached, due in ten years. A. agreed to put on the lots \$14,000 worth of improvements. The city agreed to pay \$3,000 rent per annum until the bonds were due, "by taking up the said interest coupons on said bonds as they mature." The city did not assume or agree to pay the mortgage, but if it did its title was thereby to become perfect, and

if it paid off the mortgage before maturity, the rent was to terminate from the time of such payment, and all unmatured bonds were to be cancelled and surrendered with the principal bonds. If the city failed to pay off the principal bonds at or before maturity, then it was to convey the lots to the mortgagees free from any encumbrances put on the lots by it. The bonds were executed on the day this contract was executed, and three days later the mortgage to secure them was executed, as well as a warranty deed from A. to the city. A. completed the improvements, and the city took possession. On the maturity of the bonds their assignee demanded from the city a conveyance of the lots to himself, and also demanded of the mortgagees that they bring an action to enforce the specific performance of the contract, which they both declined to do.

Held, that the assignee of the bonds was entitled to a decree of specific performance against the city, compelling it to convey the lots to him.

Claypool v. Board, etc., 261

2. *Same.*—*Hardship.*—*Unforeseen Event.*—A court of equity will not decree a specific performance, as a rule, if there is a hardship and inequality in the contract, or where unforeseen events over which the parties had no control, have subsequently occurred which would render such a decree a great hardship. *Ib.*

3. *Same.*—*Contract for Third Person.*—*Acceptance.*—*Right to Enforce.*—A person for whose benefit a contract has been made can maintain an action upon it for a specific performance thereof, by accepting its terms. *Ib.*

STATUTE.

See BILL OF EXCEPTIONS, 4; CONTRACT, 6; CRIMINAL LAW, 20; DEPOSITION; DRAINAGE, 1, 5, 7, 11; EJECTMENT; EQUITY, 1; MARRIED WOMAN; MECHANIC'S LIEN, 4; PRACTICE, 17; STATUTE OF LIMITATIONS, 4; TAXES, 1, 6.

STATUTE CONSTRUED.

See ACTION, 2; BUILDING ASSOCIATION, 2; MUNICIPAL CORPORATIONS, 5, 19, 20.

STATUTE OF FRAUDS.

1. *Contract to be Performed within a Year.*—*School Superintendent.*—*Parol Contract.*—*Failure to Reduce to Writing.*—A board of school trustees, on the 24th day of May, 1887, by a resolution passed at a regular meeting, employed the plaintiff as superintendent of the public schools of the city from the 1st day of August, 1887, to the 31st day of July, 1888. He was notified of his election and accepted said employment, but the secretary of said board failed to make any record thereof. Afterward a new board repudiated the contract, and employed another superintendent. The plaintiff offered to perform the contract on his part, but was not permitted to do so, and suit was brought to recover the year's salary as fixed by the resolution.

Held, that the contract was within the statute of frauds, and that a simple failure or refusal to put the parol contract in writing did not create an exception to the statute.

Held, also, that the charge that the secretary "wilfully and purposely failed and refused as such secretary to make the record," is not equivalent to charging that the secretary fraudulently prevented the contract from being reduced to writing and signed by the party to be charged, and does not take the case out of the statute of frauds.

Caldwell v. School City of Huntington, 92

2. *Oral Assumption of Mortgage Indebtedness.*—An agreement to assume the payment of a mortgage indebtedness on real estate, as part of the purchase-price thereof, is not within the statute of frauds.

Lowe v. Hamilton, 406

STATUTE OF LIMITATIONS.

See MUNICIPAL CORPORATIONS, 14; TRUST AND TRUSTEE, 1, 11, 12.

1. *Continuing Trust.—Demand.—When Necessary.*—The statute of limitations does not run until a cause of action accrues, and where there is a continuing trust, or where the contract is a continuing one and of such a character as to make a demand necessary to a complete cause of action, the statute does not begin to run until a demand has been made. *Parks v. Satterthwaite, 411*
2. *Six Years' Limitation Does not Run Against Judgments.*—The six years' statute of limitations does not run against a suit on the award and judgment of a court. *New York, etc., R. R. Co. v. Hammond, 475*
3. *Possession under Void Deed.—Color of Title.—Coverture.*—Possession under a void deed is sufficient to give color of title, as against the grantors, and to set in motion the statute of limitations, and the coverture of the appellant, who was the grantor, does not affect the question. *Irey v. Markey, 546*
4. *Same.—Quieting Title.*—An action to quiet title to land is governed by section 294, R. S. 1881, and must be brought within fifteen years. *Ib.*

STENOGRAPHER'S REPORT.

See BILL OF EXCEPTIONS, 2.

SUMMONS.

See JURISDICTION, 1.

SUPREME COURT.

See APPEAL, 3; PRACTICE, 4.

SURVEYOR.

See DRAINAGE, 1, 8, 10.

SURVIVAL OF ACTION.

See ACTION.

TAXES.

1. *Recovery of Amount Paid.—School Mortgage.—Priority of Lien.*—Land on which the owner has placed a mortgage in favor of the State, securing the payment of school funds, is as much liable to taxation as any other land, and one buying it at a tax sale within the year for redemption from a sale on foreclosure of the mortgage can not recover the amount paid for taxes. The school mortgage was at most but a prior lien to the city taxes. The purchaser at tax sale was bound to take notice of the school mortgage and the decree of foreclosure, both being a matter of public record. He must be held to have purchased with full knowledge of the existence of the school mortgage, the foreclosure and sale, and to have purchased subject to said lien. Section 6487, R. S. 1881, and Acts of 1883, p. 95. Section 1, specifying in what cases taxes paid can be recovered, do not apply to the cases at bar. *McWhinney v. City of Logansport, 9*
2. *Same.—Description of Land.—What is Sufficient.*—If the description of the land on which taxes have been paid is such as that it can be identified as the property owned by the person, and liable to taxation at the time of the assessment, it is sufficient. *Ib.*
3. *Same.—Voluntary Payment of.—Mistake of Law.*—Where taxes are voluntarily paid, with full knowledge of the facts, they can not be recovered. A mistake as to the law will avail nothing in such a case. *Ib.*
4. *Property of Person not Adjudged Insane.—Notice.—Validity of Assessment.*—If a person who has not been adjudged insane owns property subject

to taxation, and notice is given him, and the property is assessed by a proper officer, the assessment will at least be *prima facie* valid.

Hennel v. Board, etc., 32

5. *Same.—Omitted Property.—Invalid Assessment.—Recovery of Taxes Collected.*—Under the tax law of 1881 the auditor of a county was not authorized to make assessments of omitted property for any year or years prior to its passage or taking effect. Such a pretended assessment would be void, and the amount of taxes collected under it by levy and sale could be recovered back. *Id.*
6. *Special School Tax.—Board of School Trustees of City Has Power to Make Levy Independently of Commissioners.—Duty of Auditor to Make and Extend the Assessment.*—A board of school trustees, for the purpose of creating a special school revenue in accordance with section 4467, R. S. 1881, levied a special school tax of 40 cents on each \$100 of taxable property in the city and 50 cents on each poll. The special levy was duly certified to the auditor of the county with the request that he make the proper assessment of the special school tax as levied by the board of trustees, and extend the same upon the tax duplicate; but the auditor, under the direction of the board of commissioners, failed and refused to extend the assessment on the tax duplicate, and modified the levy made by the board of school trustees.

Held, that section 4467, R. S. 1881, authorizes a board of school trustees of a city to levy the tax independently of the board of commissioners, and when made it is the duty of the auditor to make the assessment and extend the same on the tax duplicate.

Wood v. School Corporation, etc., 206

TITLE OF LAWS.

See MUNICIPAL CORPORATIONS, 20.

TRESPASS.

See INJUNCTION, 3.

TRIAL BY JURY.

See DRAINAGE, 7; EQUITY, 1.

Partition.—Joinder with Equitable Actions.—Where a paragraph for partition is joined with paragraphs stating causes of action of exclusively equitable jurisdiction, prior to June 18, 1852, the parties are entitled to have the issue of partition tried by a jury. *Abernathy v. Allen, 84*

TRUST AND TRUSTEE.

See DECEDENTS' ESTATES, 3; PLEADING, 3.

1. *Husband and Wife.—When Husband will be Deemed to Hold in Trust for Wife.—Real Estate.—Adverse Possession.—Statute of Limitations.*—When a father, in consideration of natural love and affection, agreed to convey to his married daughter a certain tract of land, but before the conveyance was made it was mutually agreed between the father, the daughter and a brother of the daughter, who held a tract of land which he desired to exchange for the first named tract, that the father should convey said tract to the brother of appellee, and in return therefor the brother should convey his tract of land to appellee; that the land, as per agreement, was conveyed by the father to the brother of appellee, and that appellee entrusted the conveyance of the land, to be made to her by her brother, in the hands of her husband as her agent; that instead of making the conveyance to her the husband fraudulently took the conveyance in his own name, and concealed the fact from appellee, and such fact did not come to her knowledge until after the death of her husband, who died intestate.

Held, that such action by the husband was a gross fraud upon the rights

of the wife, and that equity will hold the husband to be the trustee of the wife, and that the property so held in trust is not subject to the debts of the husband.

Held, also, that the question as to whether the wife did or did not have adverse possession of the land was wholly immaterial, the evidence and the special findings showing that the husband fully recognized the right of the wife up to the time of his death.

Held, also, that the statute of limitations would not commence to run until the husband disowned his trust. *Warner v. Warner*, 213

2. *Trust.—Undue Influence.—Revocation.—Consideration.—Parol Evidence.—Bona Fide Purchaser.*—A young man between twenty-two and twenty-three years of age, without business experience or knowledge, intemperate in his habits, unmarried, and easily influenced by those in whom he had confidence, was induced by his father, a man of large wealth, great ability and force of character, and who possessed a commanding influence over his son, to convey to him for a consideration named in the deed of \$600 (no actual consideration being paid), all his property of the estimated value of \$50,000 in trust for himself for life, remainder to his personal representatives. Afterwards the father reconveyed the property to the son, and he in turn conveyed the land in dispute—a portion of that originally conveyed to the father—to *bona fide* purchasers. The son died and his legal representatives claim title to the land.

Held, that they had no title that equity would enforce, the deed to the father being unconscionable, and the reconveyance to the son being simply what in equity and good conscience it was the father's duty to do.

Held, also, that the reconveyance showed that the trustee intended that the trust should be temporary, and that it was an exposition of the contract by the contracting parties themselves, and entitled to weight.

Held, also, that the provisions in the deed declaring where the property should go in case of the donor's death, did not make the son's voluntary deed irrevocable, the facts showing that the conveyance was executed for a temporary purpose, and that the grantee, recognizing the fact that the purpose had been accomplished, reconveyed the property to the donor.

Held, also, that the purchasers from the son had a right to assume that there was *prima facie* a valid reason for the conveyance and a consideration for it.

Held, also, that it was competent to prove by parol the want of actual consideration and the circumstances surrounding the execution of the deed. *Ewing v. Wilson*, 223

3. *Conversion of Trust.—Election as to Remedies by Beneficiary.*—When a son received notes from his father for certain specified uses and purposes, he to proceed at once to collect the notes and pay part of the proceeds to the plaintiff, the donor's daughter, and the son accepted the trust, but repudiated it before it had been fully executed and before his father's death, and being appointed one of the executors of his father's will, turned over to the estate the trust property in his hands, the plaintiff could either follow the fund or proceed against the trustee. The trust property did not constitute a part of the father's estate. *Haxton v. McClaren*, 235

4. *Same.—Evidence.—Assessment Lists of Trustee.*—The assessment lists of the trustee during the period it was claimed that he had collected part of the trust fund and converted it to his own use, and showing an increase in his personal property, were admissible in evidence as tending to show that he had collected and converted said fund. *Id.*

5. *Same.—Evidence.*—The recognition by the plaintiff of the validity of

- her father's will, which was dated before the trust, would not preclude her from claiming the trust property. The will only operated on property owned by the father at his death. *Ib.*
6. *Same.—Hearsay Evidence.—Suppression of Correspondence.*—It was claimed that the father had complained that the son had suppressed correspondence between him and the plaintiff. The son offered to show in rebuttal that he had told his daughter to write all letters which her grandfather might wish, but there was no offer to show that the grandfather knew of this; neither was it claimed that the daughter was present.
Held, that the evidence, even if material, was hearsay, and properly excluded. *Ib.*
7. *Same.—Complaint.—Suit Against Trustee Individually and as Executor.*—When the trustee was sued in his individual capacity and also as executor, for the purpose of enjoining a distribution of the fund under the will, and the complaint proceeded on the theory that the fund was a trust fund, and did not belong to the estate, it was not error to refuse to render judgment against him as executor. *Ib.*
8. *Same.—Trustee's Unsoundness of Mind.—Conversations With Him.—Opinion of Witness.—Harmless Error.*—The defendants claimed that the father at the time of the creation of the trust was a person of unsound mind. A witness who was introduced to support this claim testified to many conversations she had with the father, as well as to many remarks she had heard him make, tending to show the condition of his mind. On cross-examination she was asked: "What did you hear him say imputing that any one had stolen his tobacco?" and she answered, "I never heard him say anything imputing stealing."
Held, that the question did not call for the witness' opinion of the language used by the father.
Held, also, that the answer was of such a character as to show conclusively that the defendants were not bound either by the question or answer. *Ib.*
9. *Same.—Judgment Against Debtor to Trust Fund.*—When, in addition to the judgment against the trustee, a judgment was sought against a party for the amount claimed to be due from him to the trust fund, and there was nothing in the verdict or in any finding of the court fixing the amount, there was nothing upon which to base a judgment, even if the plaintiff was entitled to this relief. *Ib.*
10. *Special Finding.—Fraud.—Recovery.*—In an action against a trustee's administrator for a conversion of money by the decedent where there is a special finding of the court, but such special finding does not show that there was any actual fraud on the part of the trustee, the case must be treated as one into which no element of fraud enters. Where fraud is essential to a recovery, it must be found as an ultimate or inferential fact. *Parks v. Satterthwaite, 411*
11. *Same.—Statute of Limitations — Exceptions to.*—The rule that the statute of limitations is a bar to suits in equity as well as actions at law has its exceptions in direct trusts, and technical and continuing trusts, which are creatures of, and fall within the exclusive jurisdiction of chancery. *Ib.*
12. *Same.—Statute of Limitations.—Declarations.—Estoppel.*—Mere declarations of the trustee that he had so arranged matters that appellant would get his money will not, in the absence of fraud, operate by way of estoppel to preclude the appellee from setting up the statute of limitations. *Ib.*
13. *Real Estate.—Agreement to Furnish Money and Take Title in Name of Another.*—A. and B. agreed to purchase a certain tract of land for \$5,700; A. was to furnish \$2,500 to make the first cash payment, and B. was

to assume the payment of the remainder, \$3,200. It was agreed between A. and B., and assented to by C., the wife of B., that the title should be taken in the name of C., and should be held by her in trust for A. and B. A. turned over to B. United States bonds to the amount of \$2,350 to be applied in payment on the land, and was to furnish the other \$150 to B. in a short time, which he accordingly did. B. was entrusted to make the purchase, and the vendor not wishing to accept the bonds as part payment, B. obtained the money from C., his wife, and made the payment. Three days afterwards B. sold the bonds as the property of C. for \$2,360, and \$1,000 was paid in cash to B. as agent of C., and \$1,360 was deposited to the credit of C.

Held, that the facts are such as to justify the trial court in finding and decreeing that C. held the land in trust, and that A. held an interest in the land in proportion to the amount of his payment to the whole amount paid. *Hill v. Pollard*, 588

UNDUE INFLUENCE.

See TRUST AND TRUSTEE, 2.

USER.

See EASEMENT.

VARIANCE.

See INSTRUCTIONS TO JURY, 4.

VENDOR'S LIEN.

See FRAUDULENT REPRESENTATIONS.

VERDICT.

See RAILROAD, 16.

1. *Should Have Reasonable Construction. — Technical Defects.*—A verdict, however formal, is good if the court can understand it. It is to have a reasonable intendment, and to receive a reasonable construction, and is not to be avoided unless from necessity, and, if rendered upon substantial issues of fact, should not be disregarded on account of mere technical defects. *Clark v. Clark*, 25
2. *General. — Answers to Interrogatories.*—A party is not entitled to judgment on the answers to special interrogatories unless there is an irreconcilable conflict between the general verdict and the answers. The fact or facts must overthrow the general verdict, or the judgment must be given upon it, for the reason that mere conclusions of law are ineffective. *Board, etc., v. Newlin*, 27
3. *Special. — Defects in Can Not be Supplied by Intendment.*—In an action where the jury returned a special verdict, and the defendant moved for a judgment in his favor on the finding, and the motion was sustained and judgment rendered accordingly, the plaintiff on appeal must fail, unless the facts set out in the special verdict support the material allegations of the complaint. Defects in special verdicts can not be supplied by intendment. *O'Neal v. Chicago, etc., R. W. Co.*, 110
4. *Contradictory Answers to Interrogatories. — What General Verdict Finds.*—Answers to interrogatories can not control the general verdict if they are contradictory, although the verdict may be in irreconcilable conflict with some of the answers. If, however, the answers state fully and without material contradiction a fact which clearly defeats a recovery, the judgment must necessarily be against a plaintiff who is compelled to establish such a fact as an essential element of his cause of action. The general verdict finds all facts in favor of the party for whom it is given unless the answers affirmatively show that such facts do not exist or were not proved. Intendment will not be made in favor of the special answers.

Matchett v. Cincinnati, etc., R. W. Co., 334

WAIVER.

See INSURANCE, 4, 5.

WILL.

1. *Election Under.—Husband and Wife.*—Where a wife dies testate, making provision in her will for her husband, the husband may elect to take under the will or under the law, but can not take under both; and when he elects to take under the one, he divests himself of his rights under the other. *Clark v. Clark, 25*
2. *Construction of.—Specific Legacies.—Charge Upon Real Estate.*—Where a testator made various bequests of money, and then, by the terms of the will, gave to his son and daughter "all the balance or residue of his estate, real and personal," and after the payment of the testator's debts and the costs of administration there was not sufficient personal estate left to pay the bequests, they became a charge on the real estate, as it was not specifically devised, but merely included in the residuary clause. *American, etc., Co. v. Clements, 168*
3. *Same.—Sale of Land to Pay.—Specific Legacies.—Duty of Administrator to Sell.*—It is the duty of an administrator with the will annexed to pay specific bequests, and if they are a charge upon or a lien against the real estate, and it becomes necessary to sell the real estate for the purpose of paying them, it is his duty to do so. *Ib.*
4. *Construction of.—Apparent Mistake.—Extrinsic Evidence.*—Where one item of a will devised the house and lot on which the testator resided "being parts of lots number fifteen and sixteen," etc., to his wife during her natural life, and a subsequent item of the will devised "the same lot number fifteen so devised to my said wife during her lifetime" to the testator's youngest daughter, and "to her heirs in fee simple forever," there is such a mistake apparent on the face of the will as will permit the introduction of extrinsic evidence to show that the testator intended to devise the same property to his daughter in fee that he had in the previous item of the will devised to his wife for life. *Groves v. Culph, 186*
5. *Same.—Admission of Evidence Explaining.—Partial Intestacy to be Avoided.*—Where a will itself discloses the fact that there was a mistake in drafting the instrument, or there are sufficient indications of a latent ambiguity, it is not error to allow extrinsic evidence to be introduced for the purpose of explaining and arriving at the intention of the testator. A will is not to be so construed as to create a partial intestacy where the result can be reasonably avoided. *Ib.*
6. *Construction.—Devise to Wife.—When Entitled to Statutory Interest and Special Devise.*—When a husband devised to his wife "in addition to" her statutory interest in his lands, other lands "with the rents and profits for the support of herself and my minor children during her natural lifetime," she was entitled to her legal estate in all of her husband's lands and a life estate in the lands devised. Under section 428 Elliott's Supp. she is not entitled to both unless it clearly appears as it does in this instance, that it was the intention of the testator that she should have the lands devised in addition to her statutory interests. *Like v. Cooper, 391*

WITNESS.

See COSTS.

WORDS AND PHRASES.

See CRIMINAL LAW, 9.

END OF VOLUME 132.

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HARVARD L